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1065-  
No. 2503

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United States 1065-  
**Circuit Court of Appeals**  
For the Ninth Circuit.

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**Transcript of Record.**

(IN THREE VOLUMES.)

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A. B. HAMMOND,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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**VOLUME III.**

(Pages 569 to 842, Inclusive.)

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Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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(Testimony of G. W. Fenwick.)

Thursday, January 30, 1913.

My relations with the Missoula Mercantile Company and my method of doing business with them during the time while I was operating the mill at Bonita were as follows: If I required any goods or mill supplies, I had all the credit that I wished at the office of the Missoula Mercantile Company. I ordered the goods of them, such goods as I required, and when I would pay off my men I gave them orders on the Missoula Mercantile Company, in such case the checks that I received from shipments of lumber, after they were placed to the credit of the proper parties on my books, were turned over to the Missoula Mercantile Company, so that I had a credit there, in addition to their willingness to extend me credit. I at all times had credit at that place. As I paid off my men the checks were honored. I could not handle any money up at the mill. We had no conveniences. After I had been operating the mill at Bonita for a couple of years, from that time forward, I had a credit balance at the Missoula Mercantile Company's store, and on that credit balance I received interest and I received interest even after I had ceased operations at Bonita and so long as I had an account there. I was charged interest upon my debit balances by the Missoula Mercantile Company. In addition to the credit given to me at the Missoula Mercantile Company's store, as I testified the day before yesterday, before I completed the purchase of this property from Fred Hammond, I had arranged a contract with the [518] late Marcus

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Daly to back me to any reasonable amount I required to run my operations there and take the lumber and pay for it; and in the early stage of my operations he advanced me funds. After that occasion on which I obtained funds from Mr. Daly, I made no formal application, but I met Mr. Daly quite frequently over in Missoula and in Anaconda, and he would ask me regarding funds and always expressed a willingness, if I needed funds, to advance them. I never called for any other funds than those which I have testified to. I knew Van Keuren, who was a witness in this case. Regarding Van Keuren testifying something to the effect that a contract had been made for furnishing the Bonita Mill with logs and Mr. Hathaway had something to do with the awarding of that contract, the fact is Mr. Hathaway, or no other person, had anything to do directly with any of my contracts. This was a contract with Van Keuren to get out a few hundred thousand, two or three hundred thousand, feet of logs. I made the contract myself, and I paid him myself, I made all of the arrangements myself. Van Keuren did not furnish any other logs to the mill while I was there, other than those covered by the contract I have just testified to. I think he worked by the month there at the mill for either myself or Fred Hammond. He worked by the month. It was after the time that he worked by the month, that he furnished these logs. There were no other contracts for furnishing logs for my mill made with Van Keuren at any time during my stay there. The only contracts made with Van Keuren or any one else



(Testimony of G. W. Fenwick.)

for furnishing logs were made by myself. Beaver Tail Hill terminates at what we call the slough or mill-pond near the north line of section 14-11-16. The mouth of Cramer Gulch, [519] with reference to the north line of said section 14, would be right at the north line—the termination of Beaver Tail Hill. With reference to the method of felling and removing timber while I was operating the Bonita Mill, each tree, with reference to each other tree, was felled separately. We did not fell one tree on top of another. They were felled in isolated positions. There were no forest fires through the Bonita Canyon during the time that I operated my mill there—none at all between the beginning and close of my work there. I resided in Montana at the time I began my operations at Bonita. I had no other residence in any other state than in the State of Montana. I continued to be a resident of Montana from 1883 until 1900. I am a citizen of the United States. During all that period of time I have testified to, I was living at Wallace, at Bonita, Missoula and a short time in Helena and at Bonner, and during that period of time I had no other place of residence, either for myself or for my family than the places I have just enumerated. Of the trees that I felled, the whole tree was utilized, that is, all of the tree that would be considered merchantable, until it ran up into the top where the limbs were or brush was. There was no sale at that time for the tops of the trees. I could not have profitably utilized the tops of the trees at the time I was cutting there. I had no use for them, no



(Testimony of G. W. Fenwick.)

sale for them. A large part of the timber that I cut was utilized in Butte, Montana, and Anaconda, for mining purposes, and the remainder of the timber that I cut was used for mining, agricultural and domestic purposes in Montana.

Q. State whether or not any demand was ever made upon you by any officer of the Federal Government for an inspection [520] of your books or records at any time during the time that you were operating this property?

To which question plaintiff objected on the ground that it was irrelevant, incompetent and immaterial. The Court sustained said objection; to which ruling of the Court defendant duly excepted.

### **Defendant's Exception No. 15.**

(Witness Continuing:) Mr. Marshall, whom I have mentioned, was an attorney practicing law in Missoula for about twenty-five years. He was there when I came there in 1883 until he died. During all the time I was operating the mill at Bonita, he was my attorney. In the matter of the conduct of my business, I acted upon the advice of the late T. C. Marshall. My course of action regarding the observance of the rules of the Secretary of the Interior, was in conformity with his instructions in regard to the law during the operations at Bonita. I went to Bonner in the summer of 1891, June or July. At that time I had closed down my Bonita Mill. I was employed by W. H. Hammond, assisting him in the operation of the mill at Bonner. That was after the

(Testimony of G. W. Fenwick.)

closing of the mill at Bonita. I looked after the general work in the office, also the manufacturing and shipping and taking care of the orders. The mill at Bonner was then running. W. H. Hammond was running it. At that time he was operating it under a lease. With regard to the time of my going to Bonner, Mr. W. H. Hammond ceased to operate the property on his own account at the end of 1891 or the first of the year 1892. I know a corporation known as the Big Blackfoot Milling Company. Myself and wife had one hundred and fifty shares of second preferred stock and one hundred and fifty shares of common stock in [521] that corporation. I owned that stock until the stock was purchased by Mr. Daly in 1898. Some of the other stockholders were W. H. Hammond, C. H. McLeod, T. C. Marshall, E. L. Bonner, A. B. Hammond and R. A. Eddy. I don't know, except in a general way, the respective stockholdings of those whom I have mentioned as holding stock in the corporation. I think Mr. Marshall's shares amounted to about the same as mine, or perhaps less. He was not one of the largest stockholders. Mr. McLeod owned quite a large bulk of stock. When he sold out he realized about thirty or forty thousand dollars. I realized sixty thousand dollars when the stock was sold to Mr. Daly. Mr. Hathaway was quite a large stockholder, larger than myself. George L. Hammond was another stockholder in that company at one time, so was T. G. Hathaway, Jr.; he was a small stockholder. Mr. J. M. Keith was a stockholder. He drew out of the sale about fifteen thou-

(Testimony of G. W. Fenwick.)

sand dollars. George L. Hammond was a brother of W. H. and A. B. Hammond. There were four brothers altogether. George L. Hammond, who has been spoken of in this case as the walking boss for W. H. Hammond; Fred Hammond, the party from whom I bought the mill at Bonita; A. B. Hammond and W. H. or Henry Hammond. Fred Hammond died after I came to California, in 1901 or 1902, I think. George L. Hammond died a year or two later, 1903 or '04, perhaps later. Milton Hammond, who was a witness in this case, was a very distant relation. Then there was another witness, John C. Hammond, who was a double cousin. I was at Bonner at the time that the company was operating under the permit from the United States to cut timber, which has been offered in evidence. No charge was made by the Government for timber cut by the Big Blackfoot Milling Company under the permit introduced [522] in evidence here. The trees that were felled either by me or by the men who contracted for me on the Hellgate, were either hauled, dragged or driven by stream to the Bonita Mill and sawed up into timbers and all kinds of lumber and shipped. So far as I know, there was none destroyed and not utilized.

#### Cross-examination.

I was born in the Province of New Brunswick, Canada. I came to the United States in 1883. I was born in the year 1848. Prior to coming to this country, I worked on a farm until I was grown. I went to school, college and also taught school. I was a school teacher just immediately before I came to



(Testimony of G. W. Fenwick.)

America. I had been teaching school eight or ten years in the Collegiate School, in Frederickton, in the Province of New Brunswick. That was a governmental school. I was engaged in teaching general subjects, English and Mathematics. I came to leave teaching and come to the United States because I wanted to change my occupation. I came direct from New Brunswick to Montana. I came at nobody's solicitation. Henry Hammond or W. H. Hammond had been out there for six months, or nearly a year before I came out and I came out with him, but not at his solicitation. Mr. A. B. Hammond was already there in business at Missoula. He had been in business there quite a number of years. For the first few weeks after I went to Montana, I did not do anything more than look around the country. I did not know whether I would stay in Montana. My first employment in Montana was with the Montana Improvement Company. Mr. Eddy and Mr. Bonner employed me to work for the Montana Improvement Company, and I had some talk with Mr. A. B. Hammond about it. As to [523] Mr. A. B. Hammond's relation to and duties with the Montana Improvement Company at that time, he had not very much to do with it. I think he was a sort of nominal manager. He was manager nominally, not actively, so far as I know. Mr. A. B. Hammond was actively engaged at that time in the mercantile business—in the Missoula Mercantile Company. As to being active manager and in charge of the business of the Missoula Mercantile Company at

(Testimony of G. W. Fenwick.)

that time, I could not say anything more than Mr. Bonner and Mr. Eddy they were partners together. I don't know what connection Mr. A. B. Hammond had any more than he was one of the partners, along with Mr. Bonner and Mr. Eddy. They were there a good deal of the time and I saw them there at all times. I could not say that Mr. A. B. Hammond was just as much in charge of the business as either Mr. Bonner or Mr. Eddy. It struck me that Mr. Bonner had charge more than any one else. Mr. A. B. Hammond had certain duties and relations with the Missoula Mercantile Company. I saw him around the Missoula Mercantile Company's store. I saw him talking to the customers, doing business with customers. He had a certain charge over the clerks and others that were doing the work in the store. I often saw him talking to the clerks. In this first employment of mine by the Montana Improvement Company, my duties were to ship the lumber for the Northern Pacific, a lot of lumber that was left over from E. L. Bonner's contract with the Northern Pacific. I think that lumber had been taken over by the Montana Improvement Company. I was stationed at Wallace. I think no lumber was being cut at Wallace at that time. After I went to Wallace there was lumber cut there for the Montana Improvement Company. The Montana Improvement Company were [524] not operating the mills at Wallace when I went there at all. J. P. Katchin was operating it. The Montana Improvement Company was not sawing lumber when I went to work

(Testimony of G. W. Fenwick.)

for them at Wallace. It had a lot of lumber on hand that had been sawed on this railroad work. It had been sawed by the other parties—not by the Montana Improvement Company. I went to Wallace in 1883 and my recollection is that the Montana Improvement Company commenced to saw lumber at Wallace in 1884. My duties were to ship the lumber out from these various mills. I billed it out for the Montana Improvement Company. As I recollect, the most of that lumber was shipped to the Northern Pacific for the completion of its works in Montana. It is my recollection that it was for the completion of its works in Montana. It is not a fact that a great deal of it was shipped to Great Falls possibly for the construction of the Northern Pacific Railroad; while I was there most of it was shipped for the completion of the work, such as station houses, round houses and section houses. That was during my early days there, my first year there, it went to the Northern Pacific. I remained at Wallace in charge of the Montana Improvement Company's business about two years and a half. Mr. W. H. Hammond was there a part of this same time. While he was there, his duties were looking after the mills that he ran there in 1884, as I recollect. He was attending to the operation of the mills. At the end of my two years and a half employment at Wallace, would bring me to early in the spring of 1886. The work played out. After I left Wallace I did not continue in the employment of the Montana Improvement Company. I was there for two years and a half, and



(Testimony of G. W. Fenwick.)

then I ceased to be in its employ. [525] My work for the Montana Improvement Company ceased a few weeks before I bought the Bonita Mill. During those few weeks I was not employed by any one. I was looking around for something to do. It was during those few weeks that I consulted with Judge Marshall about the mineral character of these lands and I was carrying on negotiations with Fred A. Hammond for the purchase of the mill. It took me only three or four weeks to do that. Then I went to Bonita and ran the mill. I ceased actually running the mill at Bonita in the spring or early summer of 1891. After I quit running the mill at Bonita I went to Bonner. In my work at Bonner I had general charge of the office, attending to the shipments of lumber, billing the orders and carrying on the correspondence, general work of that kind, as an assistant to W. H. Hammond. At that time the Bonner Mill was run by W. H. Hammond under a lease. It may have been owned by the Blackfoot Milling and Manufacturing Company, but I did all my business with W. H. Hammond. I think I knew at the time I went to Bonner that the mill there was owned by the Blackfoot Milling and Manufacturing Company. As I said, though, all of my business was done with W. H. Hammond. Henry Hammond ceased to operate the mill at the end of 1891. There never was a period of time in there when the Blackfoot Milling and Manufacturing Company operated this Bonner Mill itself. Henry Hammond operated the mill under a lease until it passed into the hands of the Big

(Testimony of G. W. Fenwick.)

Blackfoot Milling Company. I know that Henry Hammond was in full charge there until the Big Blackfoot Milling Company was formed. As to the final date of the expiration of his lease, I could not say. I know he ran it himself up until the end of 1891. I think the lease ran out at the end [526] of 1891 or the beginning of 1892 and it was taken over by the Big Blackfoot Milling Company. I don't know of any period of time when the Blackfoot Milling and Manufacturing Company ran that mill itself. I passed from the employment of Henry Hammond into the employment of the Big Blackfoot Milling Company. I remained in the employment of the Big Blackfoot Milling Company until the property was sold to Marcus Daly in 1898. The early negotiations for the sale of that property were conducted between W. H. Hammond and Thomas Hathaway on the one hand and Mr. Donohue, who represented Mr. Marcus Daly. I think the final closing of the negotiations was done by the parties I have mentioned with Mr. A. B. Hammond. I did not understand that A. B. Hammond was trustee and the stock was all in his name when it was sold to Marcus Daly. A. B. Hammond was a trustee for winding up the business. I could not say that he was a trustee to make the sale. My recollection is the stock was put in escrow in the First National Bank for Daly. I don't know positively whether it was put into Mr. A. B. Hammond's hands as trustee. I can't tell you how much per share was received for the stock of the Big Blackfoot Milling Company sold

(Testimony of G. W. Fenwick.)

to Daly, but the whole sale netted about \$1,100,000.00. I don't think it was more than that. I don't think it amounted to \$1,800,000. I am only speaking from my recollection about \$1,100,000. I arrived at that by what I got out of it, my *pro rata*. I remained at Bonner after the sale until 1899, doing the same work I had done before and for the Big Blackfoot Milling Company. After they bought the stock, the name was never changed. After I quit working for the Big Blackfoot Milling Company I went to Kalispel, a town in North Montana. I was there for a year. I was working [527] for myself during that time. There were three or four of us bought a flour mill up there. We formed a partnership and engaged in the flour mill business. Mr. A. B. Hammond was not connected with me. As to how soon after I left the Big Blackfoot Milling Company, I again engaged in work for any of the corporations or partnerships in which Mr. A. B. Hammond was interested—in the latter part of the year 1900, I came to California—not with Mr. Hammond. He had probably been here before. I did not come here with him. Since then I have been connected with his company, both as a stockholder, officer and employee, and I still bear that relationship. As to the circumstances under which I bought the Bonita Mill from Fred A. Hammond, Fred A. Hammond was desirous of selling it. He was anxious to get rid of it. Negotiations were carried on between me and Fred A. Hammond for two or three weeks, as I have stated. My recollection is that Fred A. Hammond discussed the



(Testimony of G. W. Fenwick.)

sale first with me. I would not call it approaching me. I never had any experience in the sawmill business prior to my coming to Montana in 1883. I had been a school teacher all my life. The practical experience in conducting a sawmill after I got to Montana and before I bought the Bonita Mill, was only as I saw the operations that were being carried on at Wallace in 1884. I had nothing exactly to do with the management of those mills; but I was familiar with the workings. It was right under my nose and my sight all the time. For the twenty-five or twenty-six thousand dollars I paid Fred Hammond, I bought the sawmill; I think I testified the other day that the mill, complete with barns, store, cook-house and railroad spurs, was worth between seven and eight thousand dollars. I also bought all of his teams, horses, logging trucks and logging equipment, a certain amount [528] of sawed lumber in his yard and quite a large quantity of logs that he had gotten out the winter before and had on hand. I bought in the spring and he had some logs there. As to the extent of Fred Hammond's operations prior to the time I bought the mill at Bonita—he had not sawed very much lumber, but he was getting ready. He had not been running for almost a year. During the winter he was shut down. The mill was shut down. He had been logging all winter, since August or September getting ready to operate the mill. He did not float any timber to the mill until the next spring. There were logs in the pond when I bought the mill. I don't know how many—half a

(Testimony of G. W. Fenwick.)

million feet. I don't know off of what sections these logs came from. Some had been cut on the Cramer Gulch and some from over, I think, on section 11-11-16. There were no logs in the pond that had been cut on Rich's Gulch. They were cut but not brought to the mill. The winter before I think Mr. Rich had been logging up there for Fred Hammond. Very few logs had been cut in the vicinity of the mill on section 14-11-16 by Fred Hammond—a few to put up the buildings there. I would have to guess at, or make an approximation of, the amount of sawed lumber in the yard when I bought the Bonita Mill. I would say, at least, half a million feet. The lumber was all carefully inventoried, but that is twenty-five years ago. I should think there may have been at least around in the neighborhood of a million feet of board measure of logs and sawed timber at the mill when I bought it; and that timber and those logs had all been taken to the mill by Fred A. Hammond during the time he was running it. I don't know from what particular tracts of land that stuff was taken. When I went to examine the country along the [529] Hellgate, to determine whether or not I wanted to take up the proposition to buy that mill, there was then at least a million feet of timber that had been cut along there and taken to this Bonita Mill. No doubt some of the logs that I saw cut from these different sections that had been cut prior to the time I commenced operating the Bonita Mill, had been cut by Fred Hammond. A small amount of this old former cutting that I testified to on my direct

(Testimony of G. W. Fenwick.)

examination had been done by Fred Hammond. I was familiar at that time with the timber that was usually used in making ties; a few ties were cut in the woods. It is not a fact that I could tell the difference between a tree that had been cut down to make into ties and a tree that had been cut for a saw log. I could not tell unless I saw some evidences on the ground. I know that ties are made right in the woods, and that in hewing them chips would be left on the ground in the woods where the ties were made; but they do not always make them that way. If there were no chips I could not tell whether they were made into ties or sawed into lumber, so I testified that from the stumps I could not tell whether trees had been cut for ties or saw logs. Possibly it might be that the stumpage of tie timber at that date was uniformly smaller than logging timber, but for piling and bridge timber it was larger. Ties were cut out of small stuff, but piling and bridge timbers were cut out of big stuff. In cutting trees for piling they cut off the top, so that they leave the top of the piling about eight or ten inches in diameter. I could not from the stump, or from the top if it had been left there, tell the difference between a tree that had been felled for a saw log and one that had been felled for piling. Eighteen or twenty inches in [530] diameter is about as large a tree as they would cut for piling—that is the diameter at the large end. That is, because any timber larger than eighteen or twenty inches in diameter would not fit in between the railings or guides. Sometimes in making piling



(Testimony of G. W. Fenwick.)

they take the bark off the trees there in the woods and sometimes they would not. Saw logs are barked on one side right in the woods before they take them to the mill so as to run them down the chutes, that they will skid easier. That is almost the universal process. I could not tell from the debris on the ground the difference between logs that had been cut for sawing purposes and those that had been cut for piling purposes. I could not tell unless I was on the ground and saw them do it. I could not tell you from the stumps years later. If the chips were there on the ground I could tell whether the trees had been cut for ties or not, but the debris might have been burned up. I saw some places where debris was on the ground. They never cut a tree above eighteen inches for tie purposes. Of course, they might have cut a large tree for tie purposes and have left the butt logs. I testified that in my time when I was at Bonita, there was no fire. There might have been a fire there before I was there. I could not say whether I saw any evidences of any fire; I do not know that there was a big fire in through that country. I don't know that there was any fire which destroyed evidences of these cuttings. I don't know that there was ever any fire that burned over any of the sections of land involved in this suit. Prior to the time I bought the Bonita Mill I had been on sections 10, 2, 14 and 12, in township 11 north, range 16 west and on sections 18 and 22 in township 11 north, range 15 west. I was not on section [531] 26-11-15. I was on section 22-11-15 along the river.

(Testimony of G. W. Fenwick.)

As to my object in going over those sections before I bought the mill—I was riding on horseback through that country along the county road when I was negotiating with Fred Hammond. I went along there to see the opportunities there were for logging. I did not go back from the river any distance. I rode over the sections right close to the river to judge the amount of timber that might be on them. I did not make any estimate of the available amount of timber over from the town of Bonita to Tyler Gulch at the time I purchased the Bonita Mill. At that time I was looking for the handy logs along the river. I was looking for logs within a reasonable distance from the river. If I had gone miles back, the amount of timber would be very greatly increased. I did not make any close estimate at all of the amount of timber in the Hellgate from the crest of one hill to the other. I saw there was enough there to run my mill for a few years. I did not know any of the section lines or corners at that time, and the only reason I could say I was on section 10, or 12, or 2 or 14, is because I now locate it by natural objects, the same as the other witnesses have done here. There were no lines run there in my time. It was about the time I commenced to talk with Fred Hammond about the purchase of the Bonita Mill that I began to consult Mr. Thomas C. Marshall in regard to the act of June 3, 1878. No one suggested that I consult Thomas C. Marshall. My own sense suggested it. I realized the importance of it and that I should get proper advice on a matter of that nature. He told me of the

(Testimony of G. W. Fenwick.)

act of June 3, 1878. I had heard of it before. He read it to me. The exact terms of the act and the exact description of the lands from which I was entitled to cut made an impression on me at the time, but I could not tell at this late date. I [532] understood that I was only entitled to cut from lands that were subject to entry under the mineral laws of the United States, as provided by the act. It must have been between the middle of May and the last of the month of May, in 1886, that I actually took over the control of the Bonita Mill and commenced to run it and it was pending the negotiations before I actually took over the mill, that I saw Mr. Marshall. Fred Hammond stayed there when I took control and gave me such assistance as he could, in a friendly way, after the deal was finally closed. I had charge there and was in possession of the works, but he kept coming backward and forward there off and on for some little time.

Q. He was there up until the middle of July?

A. At times he would come and go, as he saw fit.

(Witness Continuing:) I could not say whether I had more than one conference with Mr. Thomas C. Marshall in regard to my rights under the act of June 3d, 1878. I saw and talked with Mr. Marshall. I had heard discussions before I went to Fred A. Hammond, in regard to the law of 1878, and other people were operating and cutting under what I supposed was that same law. That was a matter of common discussion there at that time. Any advice I took I took from Mr. Marshall. He was employed



(Testimony of G. W. Fenwick.)

by me as my attorney for the purpose of advising me with regard to this act of June 3d, 1878, and my rights under it, and for other purposes, but that was one specific purpose. Mr. Marshall at the start invited my attention to some of these regulations. He explained to me the law of 1878. I considered at that time I understood it because I was operating under it all of the years I was there. In regard to the mineral [533] character of these lands, I had read the letter of Senator Teller describing what were considered mineral lands. I think Mr. Marshall also called my attention to the rules promulgated by Secretary Lamar on May 7, 1886. There was a lot of discussion at that time; I could not say; I think I was familiar with the Lamar rules. I think in September some new rules were put in force and I presume I discussed them with Mr. Marshall. I don't remember all of the details; that occurred twenty-five years ago. As to the provisions of the following section: "Second: The land from which timber is felled or removed, under the provisions of this act, must be known to be strictly and distinctly mineral in character and more valuable for mining than for timber or for any other purpose or use." At this late date I could not tell what particular section Mr. Marshall called to my attention. All I know about it is, I was acting under his advice and instructions at that time. I cannot remember the details as to the different sections that he read to me. I understood that part of the law providing that "timber, felled or removed, shall be strictly limited to

(Testimony of G. W. Fenwick.)

building, agriculture, mining and other domestic purposes." I don't know whether he called that particular provision to my attention or not, but I knew that. I don't know how I knew it. I could not say at this time whether the following section of the rules of the Secretary of the Interior was called to my attention: "All cutting of such timber for sale or commerce is forbidden, but for building, agriculture, mining and other domestic purposes, each person authorized by the act may cut or remove for his or her own use, by himself or herself, or by his or her or their own personal agent or agents only." As to the length [534] of time I spent in investigating the character of these lands along the Hellgate before I commenced cutting on them—during the two years and a half I was in the Hellgate Canyon I was up and down the canyon frequently. I did not have any particular point in mind during the two or three years that I was searching out to find the mineral or non-mineral character of these lands. I was not specially interested in those sections any more than other places. I was looking around for a good place where I could get timber.

Q. Tell the jury, in all the time that you knew section 10-11-16, what was there that enables you to say that that section was more valuable for mineral than for any other purpose?

A. I could not tell on section 10.

(Witness Continuing:) I did not see any myself on section 10. My recollection is that there was some prospecting on the north half of section 10.

(Testimony of G. W. Fenwick.)

That was during my early days at Bonita, after I commenced my operations; after I had determined that it was mineral land under the explanation of what constituted mineral land given by Senator Teller. I saw this prospecting there the summer of 1886. I think it was after I had commenced my operations there. I don't think I ever saw any prospecting up in section 2-11-16, in Cramer Gulch. I saw prospecting on section 14-11-16. That was shortly after I went to Bonita. Some parties were prospecting on Beaver Tail Hill right opposite to me. It was on the north side of section 14, adjoining section 11. I thought that section 14 was mineral land, the same as all that land around there.

Q. Don't you know that all out in the bottoms there [535] was nice bottom farming land, and ever since the land was surveyed and anyone could enter it, it was entered under the homestead laws of the United States and has been farmed from that day to this?

A. I saw some prospecting done there. Farming on some part of it. There was no farming on the island.

(Witness Continuing:) The sawmill and buildings were over on the island. The river branched at this point and the land between the branches was called the island. One branch was used as a sort of log pond. The prospectors sunk a hole on the ground on the sidehill on the north side of section 14-11-16. My recollection is they worked there about a month. It was abandoned afterwards. There was no work done on it in my time after that. I was not up there this summer at that place. It had all grown up with



(Testimony of G. W. Fenwick.)

brush, and I could not see it. I do not think there has ever been any mine there; nothing of any value taken from it that I know of. It was abandoned. I don't know where the next spot was that I saw any prospecting done in the Hellgate Canyon. There was a mining claim taken up by Tyler in section 23-11-15. I don't think that was in operation when I first went there. I was riding up and down that country all of the time. It was not being worked for mining purposes, that I recollect. It was partially a hay field. I don't know how long it remained a hay field. While I knew it, I do not think I ever saw a miner stick a pick in it for the purpose of mining. Prior to the time that I took charge of the Bonita Mill, I had seen no mining claims located on any of the ground involved in this suit. I saw mining claims east and west, at Wallace and Bearmouth. I don't think I at any time saw any mining claim located on any of the [536] lands involved in this suit. There was a mining claim at Carlin, or Nimrod, but that was along in 1894—about that time—quite a few years after I took charge. I don't think that placer mining claim was on any of the sections involved in this suit. My first impression as to my right to cut was based on Secretary Teller's letter, as I have already testified; it was based on what I believed to be the general mineral character of the country. I did not base my opinion on any definite mine. At Wallace, a few miles away, there was a mine, and I talked to people, old miners in the country. The Wallace mine was located at Wallace. It had been in operation several years when I bought

(Testimony of G. W. Fenwick.)

the Bonita Mill. It is seven or eight miles west of section 10-11-16. There were very extensive mining operations on Rock Creek for two or three years and a vast amount of money was spent there; that was called the Quigley Mine. They spent hundreds of thousands of dollars there, but it was never developed into a paying mine at that time. I don't think it is a paying mine to-day. The mine was abandoned, but whether it was a business failure because the mineral was not there, I don't know. Those Quigley operations were three or four miles from the land involved in this suit. Rock Creek is some three or four miles west of said section 10. I don't know how far up Rock Creek the Quigley operations were. The Quigley operations were not until after I commenced cutting in this vicinity. I could not say how long after I commenced cutting. There was nothing about the Quigley mine operations that caused me to determine that this land was mineral in character. When I came there in 1883 there were lots of old miners around Wallace and all through that country. As I recollect it, I think it was about 1884 or 1885, that I first found out there [537] was a Wallace Mining District. I don't know that I ever saw this Defendant's Exhibit "G," which purports to be the minutes of the meeting at which the Wallace Mining District was organized and its boundaries defined, before I saw it in the courtroom. I would not say that I did. I testified that I saw a number of affidavits. I saw them at Colonel Marshall's office. Those affidavits were sworn to before Mr. Marshall as Notary Public, but I am not certain about this

(Testimony of G. W. Fenwick.)

paper, Defendant's Exhibit "G." I don't know when I first saw it. At the time I took charge of the Bonita Mill, the land on section 14-11-16 was unsurveyed. I did not know what section of land I was on. No person settled on that land on section 14 for the purpose of claiming rights as a homesteader or pre-emptioner while I was there. I could not tell the date when I first learned I was on section 14. I don't remember now. I had a contract with Mr. Marcus Daly to furnish timber for the mine. In the contract with Mr. Daly I acted as his agent. Of course, I found the mill teams and other things and the price that he paid me was compensation for the agency. Mr. Daly had nothing to do personally with the operation of my mill. As his agent, I was to furnish him this lumber and saw this lumber and ship it to him. I had no contracts there with any other people to whom I sold lumber. I sold nearly all of my lumber to him; a small amount I sold to outside people. As to whether it was necessary for me to be appointed as his agent in order to sell him that lumber, that was a part of the conditions of the contract I entered into with him. The acts I performed for Mr. Daly were in sawing and furnishing him this lumber. He had no interest in the mill. I owned the mill and owned the lumber and I shipped the lumber to him. The checks he sent me in payment for the lumber I did not turn over to the [538] Missoula Mercantile Company. The checks came to me, to my address at Missoula. Mr. Winstanley kept my books in the upstairs office of the Missoula Mercantile Company's building. When the checks came



(Testimony of G. W. Fenwick.)

in, the parties sending them received credit for the checks before anything else was done with them, and they were eventually turned over, like all of the other checks, to the Missoula Mercantile Company, in payment of my bills—placed to my credit. The details of the business I did with Mr. Daly were conducted just the same as my business done with any other persons to whom I sold lumber. When [539] I quit Missoula, I spent the best part of a year before I went to Eureka. The Hammond people had no interests in Eureka when I went there. I was instrumental in getting Mr. Hammond interested in Eureka. I made a report of what I found in Eureka—I rather advised him to come there. I went there for the purpose of investigating property owned there by Mr. E. H. Vance, whom I had met in Missoula. He told me about this proposition in Eureka, and on the strength of that I went there. I went there to investigate it for myself, but I could not swing a proposition that big; I think I could have got other people interested in it than Mr. A. B. Hammond. Afterwards A. B. Hammond did swing the deal for me. I am in Mr. Hammond's company as a stockholder and an officer all these years since then.

#### Redirect Examination.

I testified as to a mine at Bearmouth. Bearmouth was the second greatest placer mining country in Montana. Gold had been taken out there since the '60's, amounting to millions of dollars. That was four or five miles from the extreme eastern end of my operations at Bonita. It is about four miles east

(Testimony of G. W. Fenwick.)

of section 26-11-15. The Bear Gulch mines were historical and a matter of interest to any person coming to Montana. I am vice-president of the Northern California Division of the Hammond Lumber Company. I and my family have one hundred shares of the first preferred stock and two hundred and forty-seven shares of the common stock. By my family, I mean my wife and myself. I am just giving you the figures from memory. The first preferred stock has a par value of one hundred dollars and the value of the common stock, that depends upon its earnings. One hundred dollars is the par value [540] of the common stock. In response to Mr. Hall's question, I spoke of Mr. Hammond's connection with the Missoula Mercantile Company in 1883; but if I said so, I must have made a mistake. The Missoula Mercantile Company was organized sometime in the summer of 1885. In 1883, Mr. Hammond was connected with Eddy-Hammond & Company, which continued up to 1885. What I have said about 1883 refers to Mr. Hammond's relations to the Eddy-Hammond Company and not to his relations with the Missoula Mercantile Company. There were other stores in Missoula, general merchandise stores, in the years I was operating at Bonita. There were three or four large stores, besides a lot of small ones. I mean stores that carried goods to the extent of perhaps one hundred thousand dollars. During the time I was operating the Bonita Mill, I paid the taxes on my property myself. They were assessed to me. The Montana Improvement Company did not oper-

(Testimony of G. W. Fenwick.)

ate any mills either in Deer Lodge County, or in Missoula County, or in the State of Montana, other than those Wallace Mills. It acquired the two Wallace mills in the fall of 1884. They were only small portable mills. Their capacity would average ten or twelve thousand feet a day; each mill about ten thousand feet a day. The Montana Improvement Company first began to operate them the last of '84 or the early part of '85. J. P. Katchin owned these mills prior to their acquisition by the Montana Improvement Company. After their acquisition by the Montana Improvement Company, these mills were engaged in cutting material for completing the construction of the Northern Pacific Railroad—depots, roundhouses and snow-fences; an immense amount of stuff like that; that was the kind of material shipped out while I was there. I came to Bonner in the summer of 1891. The shipments were made in the name of [541] W. H. Hammond. Concerning the testimony offered here to the effect that shipments arrived at Helena from the Blackfoot Milling and Manufacturing Company, this company had a number of small mills in the Bitter Root Valley. As to whether or not I know that that corporation shipped lumber from these mills in the Bitter Root Valley to Helena, I saw cars go by that were placarded from the Blackfoot Milling and Manufacturing Company. I could not say of my own knowledge. I did not see the lumber loaded on the cars and I did not bill it myself. It is a matter of my own knowledge that the Blackfoot Milling and Man-



(Testimony of G. W. Fenwick.)

Manufacturing Company was operating mills in the Bitter Root Valley. I could not tell the particular sections that the lumber and logs on hand at the Bonita Mill when I purchased same came from, because a part of them came down the river through this flume into the pond. Some of them were hauled there during the winter season. They came from different sections, different localities. I know the general locations of where those logs that came down the river and into the flume and pond came from. Some of them came down from what was called Rich's Gulch. They were logged there by Rich the winter before; that would be on section 7-11-15; it was not on section 8-11-15. The mouth of the gulch is on section 7. Some of them came from over on section 11-11-16, and some of them came out of section 2-11-16. A half or three-quarters of a mile of Rich's Gulch is on section 7. The logs that were at the mill when I brought out Fred Hammond, which had come down the flume, were all cut contiguous to the Hellgate River. Concerning the debris on the ground left by the peeling of trees, by the making of ties and with reference to my last visit, which was in September, 1912—the ground that I went over and examined, a [542] great deal of the debris had been burned by fires that had gone through there since I left there fifteen or twenty years ago. What was not burned had been rotted away and there was no debris left there at all. It had disappeared. I know of no means whereby I could ascertain at this late date where debris has been either burned or rotted away

(Testimony of G. W. Fenwick.)

whether or not the stump that was there represented a tree that had been felled for logging at the mill or for other purposes connected with the building of a railroad. I went on the lands last September. Mr. C. E. Woodworth, who has testified here, pointed out the lines to me. In reference to the contract of agency, I had with Mr. Daly, which I have testified to, there was a money compensation, first of all, and I am quite sure there was an indemnity clause in that contract. That indemnity clause was to save me harmless against any claims for stumpage that might come hereafter.

#### Recross-examination.

I needed the protection of the indemnity clause given by Mr. Daly for stumpage, for I knew that if for any reason that land should be held not to be mineral land, the railroad company would claim all of the odd sections.

Q. You did have a belief at that time that you might be held responsible for cutting from these lands because they were not mineral, didn't you?

A. I did not want to take any chances at all.

Q. And you were not taking any chances because you were given this indemnity clause, were you not?

A. It might have turned out differently later on, I did not know.

Q. And you were protecting yourself, and you were not relying solely then on the fact that the act of 1878 allowed you to cut on mineral land? [543]

A. I think I did.

Q. You were not relying on that solely, were you?

(Testimony of G. W. Fenwick.)

A. I might not have afterwards.

Q. You were relying principally upon the indemnity clause in your contract with Mr. Daly?

A. I could not interpret the law.

Q. And you don't pretend to interpret it now?

A. No; but I acted according to my best judgment at that time.

Q. And you at that time asked Mr. Daly to hold you harmless from cutting upon the public lands?

A. I wanted to fortify myself on all sides.

(Witness Continuing:) Mr. A. B. Hammond is president of the Hammond Lumber Company, which is the company that I am now an officer of. Thomas Hathaway was an officer of the Montana Improvement Company, but I don't know what office he held. As to my financial condition when I arrived in Wallace, in 1883 or 1884, I brought a certain amount of money with me. I could have lived a year without doing anything, at least. I left certain property back in Canada, which I afterwards turned into money. I afterwards got between two and three thousand dollars for it. That was in 1884, after I came to Missoula. I think I had \$2,000 in money in 1885 when I was at Wallace. I had no other property. [544]

Q. I ask you to look at a certified copy of your assessment list as taken from the assessment-roll of Missoula County, Montana, for the year 1885.

A. The total amount appears to be \$580.00.

Q. You turned in your assessment list that year yourself, didn't you?



(Testimony of G. W. Fenwick.)

A. I forget, perhaps I did—you say this was for 1885?

Q. Yes.

A. I may have turned it in direct or authorized Mr. Moser or Mr. Winstanley of Missoula to do it for me.

Q. And if you authorized anybody to do it for you, you authorized somebody that was familiar with your business and your property rights?

A. I may have, I could not tell. We were not always assessed for the full value of our property, and especially we were not in those early days in Montana.

Mr. WHEELER.—Do you know whether or not your assessment for that year was made up by the assessor or by yourself, or by someone else for you?

A. I could not tell at this late date.

Thereupon plaintiff offered in evidence certified copy of said assessment list and the same was received in evidence and marked "Government's Exhibit No. 12"; and the said assessment list reads as follows: Wagons and carriages, 1, \$50.00; amount of money \$500.00; watches, 1, \$50.00; No. polls 1, age 37; total amount \$580.00. Total amount of taxes paid \$20.95. [545]

My recollection is that the Montana Improvement Company ceased to saw lumber at the Wallace Mills in 1885. Some lumber was sawed in 1885. They were closed about that time. I spent some time in Helena and while there, was employed part of the time by Mr. B. H. Coombs, who was running a lumber

(Testimony of G. W. Fenwick.)

yard there. Mr. A. B. Hammond did not have any interest in that lumber yard, that I know of. I have no information that he did. I don't know.

Redirect Examination.

Concerning the indemnity clause in my contract with Mr. Marcus Daly, I thought this question of whether or not the land was mineral land, might be a question of law as well as a question of fact. The reason I took this provision of indemnity in my contract with Mr. Daly was, to meet the possibility at a later day, if for any reason it should be decided not to be mineral land, and hence the railroad company would come in and claim every alternate section.

Mr. WHEELER.—That is all, Mr. Fenwick. I next offer in evidence certified copies of certain assessments for taxes for the years 1886 to 1891.

Mr. HALL.—What are they?

Mr. WHEELER.—Mr. Fenwick's taxes at Bonita.

Mr. HALL.—No objection.

Mr. WHEELER.—For the year 1886, without reading any unnecessary part, "Name, George W. Fenwick; Postoffice address, Bonita; amount of merchandise, \$5,200; amount of capital invested in manufactures, \$4,000; horses, 16, \$1,120; oxen and steers over two years old, 12, \$360; hogs, 3, \$12; wagons and carriages, 4, \$120; amount of money, \$1,000; watches, 1, \$40; clocks, 1, \$3; total amount, \$11,855." [546]

(Defendant's Exhibit No. H-1.)

Mr. WHEELER.—Assessment-roll for the year 1887.

(Testimony of G. W. Fenwick.)

“George W. Fenwick, Postoffice address, Bonita; by whom listed, self; amount of capital in manufactures, \$2,000; horses, 12, \$1,200; mules and asses, 1, \$100; oxen and steers, two years old, 5, \$250; value of stocks subject to indemnity tax, \$1,550, raise on sawmill from \$2,000 to \$3,000; stock shares, \$1,000; lumber \$760; all other property, \$350; total amount of assessment, \$4,660.”

(Defendant's Exhibit No. H-2.)

Mr. WHEELER.—Assessment-roll for the year 1888.

“George W. Fenwick, Postoffice address, Bonita; value of merchandise \$2,900; amount of capital in manufactures, \$1,500; 22 horses, \$2,200; hogs, 3, \$10 wagons and carriages, 5, \$200; watches and clocks, 1, \$50; all other property, \$280; total \$7,190.”

(Defendant's Exhibit No. H-3.)

Mr. WHEELER.—Assessment-roll for 1889.

“Name, George W. Fenwick; Postoffice address, Bonita; age 42; one if \$9,200 and underneath \$5,200, and then \$200 and \$210; value of lots, \$400 and \$410; toll roads, bridges and so forth, \$533, \$547;—the total amount of the assessment being \$10,830.”

(Defendant's Exhibit No. H-4.)

Mr. WHEELER.—Assessment-roll for 1890.

“Name, George W. Fenwick, (Reading the items) total value of property \$10,550.”

(Defendant's Exhibit No. H-5.) [547]

**[Deposition of William <sup>W.</sup> Wills, for Defendant.]**

Defendant offered and read in evidence the deposition of WILLIAM K. WILLS, a witness



(Deposition of William K. Wills.)

called and sworn on behalf of the plaintiff, as follows:

*Direction Examination.*

(By Mr. HALL.)

I reside at Baird, Montana; I am postmaster up there. I have been such for three years. My occupation is farming. I have been living in the vicinity of Baird since May 24, 1894. I followed mining as an occupation once. I worked in quartz mines between six and seven years in Montana. First of all, at Gregory, which is about twenty miles from this city (Helena). I worked there two months; [548] I was a laborer in a mine. They had a smelter up there; the ore was treated right there; it was a fully developed and going mine; I also worked in the Granite Mountain, which was a quartz mine. I never did any work in placer mines. My knowledge of mining, and quartz mining in particular, has been acquired by practical mining work. I think I worked something over four years in the Granite Mountain mine. The Granite Mountain mine was silver, but I believe the Gregory was silver and I think lead. I have had some experience in prospecting and locating mining ground. My house is on section 7, township 11 north, range 15 west. I am familiar with section 6, in township 11 north, range 15 west, in the State of Montana. I have been over the same; if I understand right, that is the section where there is a lake right on the section line, between five and 6. I prospected on section 7, township 11 north, range 15 west, and we did half

(Deposition of William K. Wills.)

a day's work prospecting on the adjoining section 8. That is all the prospecting I did. We did a hundred dollars worth of work on section 7. There were three of us interested. A man by the name of E. H. Price was associated with me in that venture. We hewed our trees and our corner posts, marking the boundaries of the claim on section 7 that we claimed under the general mining laws of the United States and attempted to comply with the regulations in regard to marking and posting the boundaries of mining claims. We did not sink any shaft. We excavated more like an open quarry than anything else—it was loose rock. I guess we went in ten or twelve feet, to the best of my knowledge; we never measured it, but we did our work there. As to whether we found any ore in that tunnel, we got an assay and we brought in a sample to be assayed. We got a trace of [549] . gold; that was all.

Q. From your experience as a mining-man, was there a sufficient showing of mineral in place to justify an experienced, prudent miner in expending work and labor and money thereon, with a reasonable expectation of producing a paying mine from the ground?

A. When we got the return from the assayer, it discouraged us and we dropped it.

(Witness Continuing:) This partner of mine, he had another claim on section 7 right east of it; I was not interested in that. There was no mine on section 7 at this time. There was no mineral claims located on that section at this time. There has been

(Deposition of William K. Wills.)

no ore taken out and shipped from section 7 to my knowledge. I have been familiar with this ground in section 7 all the time since I located my mining claim. I have been over it and across it and went up and down and every other way.

Q. From your knowledge of the entire section there and from your experience as a miner, is section 7 mineral or nonmineral in character?

A. Well, we gave it up for the want of mineral; we could not see that it would justify us; I don't see what else I could term it.

(Witness Continuing:) I made an examination of section 8, in the same township and range, for the purpose of determining its mineral or non-mineral character. This same man Price and I went up on section 8, on a particular ridge there, and blasted in a kind of a rock we thought was mineral bearing; we did not discover any ore there; we blasted the rock and we had nothing left; it was [550] a kind of boulder, it seemed to set right on the top of the ridge. That was in the southwest forty of the entire section, the southwest quarter of the southwest quarter. Afterwards, I entered a portion of section 8 under the General Land Laws of the United States as a timber and stone claim—one hundred and sixty acres. My wife also acquired a portion of section 8 from the Government as a timber and stone claim; another part of section 8 I bought at public sale at the Land Office; it was advertised for sale. I bid on it; it was sold as an isolated tract, if I understand the term. My timber and stone entry and my wife's



(Deposition of William K. Wills.)

timber and stone entry, each contained one hundred and sixty acres, and there were one hundred and twenty acres in the isolated tract, so that in all we acquired in section 8 four hundred and forty acres, all of the entries being such that we could acquire title only because of the non-mineral character of the land. I believe I made a non-mineral affidavit covering the land in my timber and stone entry, as also did my wife, and the affidavit read it was more valuable for stone and timber than it was for mineral. I am familiar with some of the lands lying along the Hellgate River in township 11 north, ranges 15 and 16 west, particularly familiar with sections 2, 10 and 14, in township 11 north, range 16 west, and sections 6, 8, 18, 20, 22, 23 and 26, in township 11 north, range 15 west. I could not say that I am familiar with all those sections, but there is a part of them that I am familiar with. I am familiar with that general scope of country that extends from about the station Bonita on the Northern Pacific Railroad to a distance of some nine or ten miles east. I have been all over the country. I have been along the road there and all those mountains. [551]

Q. From the crest of the mountain on the east of the valley to the crest of the mountain on the west of the valley, extending along it for a distance of ten or twelve miles east of the station of Bonita, do you know of any mines that are now in operation in that country?

A. At Copper Cliff there is some mines there; I

(Deposition of William K. Wills.)

don't know whether that is out of the range or not; I don't know where Copper Cliff is located on that map.

(Witness Continuing.) Copper Cliff is up some ten or twelve miles north through Cramer Gulch and Cramer Gulch starts in just north and east of Bonita; the mouth of Cramer Gulch starts out of the Hellgate Valley in the vicinity of Mr. Cook's house. Copper Cliff, I think, is some ten or twelve miles to the north of that, over the crest of the range. I visited that place once. I went up there and down on the other slope, a short distance on the north side. I do not know of any mines by the river or railroad in the Valley of the Hellgate and along the mountains on either side immediately adjoining the Hellgate River for a distance of ten or twelve miles east of Bonita.

Q. As long as you have been there, have you ever observed men prospecting or attempting to locate mines throughout that section?

A. Why, there are some mines located at Dry Gulch right close to the railroad station on the Northern Pacific called Nimrod.

(Witness Continuing:) These are upon the north side and a little west of Nimrod. They are away up in that gulch up on the side hill. I have seen where they prospected there. Nimrod is west [552] of Tyler Gulch. The station of Nimrod lies about a mile and a half from the mouth of Tyler Gulch, making a rough guess at it. From these prospects that I have seen located on the mountain

(Deposition of William K. Wills.)

north of Nimrod, I have never seen any ore that has been shipped or any mining carried on, just prospecting.

Cross-examination.

(By Mr. BURNETT.)

There was a copper prospect on the west fork of Cramer Creek. I could not tell the section it is in, but it is on an odd section because there is some dispute about it. Making a rough guess, I would guess that by the road, the prospect would be about three and a quarter or four miles from the Hellgate River, but straight across from the mouth of Cramer Creek, it would be probably two miles. It is a number of years now since that has been prospected. The parties prospecting still actively claim it. He has been there since he started a number of years ago up to the present time. I hear him talking about doing the assessment work; I am acquainted with the man who claims it. I knew there was a placer mining excitement about half a mile west of Carlin since I have been there. I remember Steele. I know that he did some work there on the placer mine and that they called it a placer claim. I also knew of another copper mine about a mile west of that operated by a man by the name of Kirby. I know that there has always been prospecting in that country, especially placer prospecting, down in the Hellgate River. They prospected there at different times; that was done about the time I struck there first, about 1895, that the placer excitement was there. There was no excitement the first year



(Deposition of William K. Wills.)

I was there; it came up after, I could not tell you [553] exactly the date, but to the best of my knowledge it was along about 1895.

Redirect Examination.

(By Mr. HALL.)

In all of the time that I have been there, all engaged in this placer mining in the bed of the creek gave it up and there is not any place along the Hellgate River, in either one of those townships, any man that is doing placer mining, that I know about. All the placer mining that was done there was not confined to the immediate bed of the Hellgate River and its shores—it was not right down level with the immediate bed, I don't think; it was right down in the gulch, a short distance. The operations that Steele worked there was on the north side of the river, up Dry Gulch. I was there when they were working those operations of Steele. It was along the fall of the year—I don't know how long he continued to work there; two or three months, some such matter as that. He or no other man ever placered there in that particular spot since then to my knowledge. Joe Kirby was on the opposite side of the creek. It was in a gulch right close to the river, but it stood up some twenty-five feet from the water. I think Kirby must have been operating there about 1896 or 1897. I know it was when I first went there that that thing came up and died out again. There has been no work done there since to my knowledge. The mine location that Mr. Burnett spoke of on the left-hand fork of Cramer Gulch

(Deposition of William K. Wills.)

is known as what is the Gill location. I heard Gill speaking about his mine a short time ago, about his doing his assessment work on it. Gill has never shipped any ore from there, as far as I know. I never examined it [554] myself. I talked with him and that is all I know about it.

Recross-examination.

(By Mr. BURNETT.)

Concerning this claim of Steele, I noticed down there at the river when Steele was working that claim a large wooden flume. That was quite an expensive construction. Mr. Steele told me it was built to assist in working that mine. I never saw the water come through the flume; I was there when they were building the flume and they informed me it was for this placer mine. I could give you a rough estimate, so you could figure out the cost of that flume. I think the flume was made out of foot-boards; there was a board on each side and a bottom, and that is as close as I could give it, but you can figure it out. I don't know whether it would cost in the neighborhood of \$5,000.00. I don't know how many thousand feet of lumber there is there; it cost lots of money to pack it up on the hill.

Redirect Examination.

(By Mr. HALL.)

The Steele flume was used for placer mining just that fall, if it was used at all. I never saw it used for placer mining, but the joke was when they turned the water in it ran the other way. I never

(Deposition of William K. Wills.)

saw them take any placer gold out of that flume, and it has been abandoned for the last twelve or fourteen years and the flume is rotten and fell down the mountain. [555]

Thereupon defendant offered and read in evidence certified copies of notices of locations of mining claims situated in the said Wallace Mining District, which said notices are respectively in the words and figures following, to wit:

**[Exhibit—Notices of Location of Mining Claims in  
Wallace Mining District, etc.]**

Medicine Lode.

Notice of Location.

Medicine Lode Claim, Wallace Mining District.

Missoula County,

Territory of Montana,—ss.

Notice is hereby given that the undersigned has this 27th day of July, 1878, located 1500 feet in length and 600 feet in width on the above quartz lode mining claim, bearing gold, silver, copper and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at this notice and running 300 feet west, thence 750 feet in a northern direction, thence 600 feet in an eastern direction, thence 1500 feet in a southerly direction, thence 600 feet in a western direction, thence 750 feet in a northern direction connecting with the center of the claim, comprising 1500 feet in a north and south direction and



300 feet in a east and western direction from the center of discovery shaft, and including surface ground 300 feet in width on each side of the center of said lode, the corners of said claim being marked by posts firmly set in the ground, so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 27th day of July, 1878.

(Signed) W. H. ERSKINE,  
JAMES HOUSE,  
MATT COLEMAN,  
JOHN FREDLINE,  
Claimants. [556]

Montana Territory,  
Missoula County,—ss.

The undersigned, being first duly sworn, on oath, says that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described, as posted at the Discovery Shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,  
County Recorder.

Received and filed for record on the 12th day of August, 1878, at 9 o'clock A. M.

FRANK H. WOODY,  
County Recorder.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.

By Gust Moser,  
Deputy Clerk. [557]

Extension of the Hidden Treasure Lode.

Notice of Location.

Extension of Hidden Treasure Claim.

Wallace Mining District, Missoula County, Montana  
Territory.

Notice is hereby given that the undersigned have this 12th day of August, 1878, located 1500 feet in length and 600 feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper and all other metals contained therein within the following described metes and bounds, to wit: Beginning at the center S. W. stake H. T. Lode, running N. W. 300 feet to S. W. corner stake H. T. thence S. W. 1500 feet to stake marked same thence N. E. 600 feet to tree marked same thence N. E. 1500 feet to S. E. corner of H. R., thence N. W. 300 feet to the place of beginning, comprising 900 feet in a N. W.

direction, and 600 feet in a S. W. direction from the center of Discovery shaft and including surface ground 300 feet in width on each side of the center of said lode. A copy of this was posted at Discovery shaft on the 13th day of August, 1878.

(Signed) EUGENE LENT,  
JOHN U. McKAY,  
Claimants.

Montana Territory,  
Missoula County.

The undersigned being first duly sworn on oath says that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim described as posted at the Discovery shaft thereon on the day therein stated.

(Signed) EUGENE LENT. [558]

Subscribed and sworn to before me this 13th day of August, 1878.

FRANK H. WOODY,  
County Clerk.

Filed for record on the 16th day of August, 1878,  
at 10 o'clock A. M.

FRANK H. WOODY,  
County Recorder.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all



the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.  
By Gust Moser.

Clipper Lode.

Notice of Location.

Clipper Lode Claim.

Wallace Mining District, Missoula County, Territory  
of Montana.

Notice is hereby given that the undersigned has this 14th day of August, 1878, located 1500 feet in length and 600 feet in width—on the above-named quartz lode mining claim, bearing gold, silver, copper and other metals, situated in the [559] mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at the northern centre end stake running thence southwest 300 feet, having the North Trail Creek as southeast corner, running thence 1500 feet to tree blazed and marked S. N. W. 600 feet, the stake marked, thence northeast 1500 feet to the North Trail Creek, thence down said creek to the place of beginning, comprising 1500 feet in a northerly and southerly direction and including surface ground 300 feet in width on each side of the centre of said lode.

(Signed) EUGENE LENT,  
JOHN U. McKAY,  
Claimants.

Montana Territory,  
Missoula County.

The undersigned being first duly sworn on oath says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim described as posted at the Discovery Shaft thereon on the day therein stated.

(Signed) EUGENE LENT.

Subscribed and sworn to before me this 16th day of August, 1878.

FRANK H. WOODY,  
County Clerk.

Filed for record on the 16th day of August, 1878,  
at 11 o'clock A. M.

FRANK H. WOODY,  
County Recorder. [560]

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify, the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.  
By Gust Moser,  
Deputy Clerk.

Free and Easy Lode.

Notice of Location.

Free and Easy Lode Claim.

Wallace Mining District, Missoula County, Montana  
Territory.

Notice is hereby given that the undersigned has August 15, 1878, located 1500 feet in length and 600 feet in width on the above-named quartz lode mining claim, bearing gold, silver, iron and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at east centre stake, running thence southeast 300 feet to corner, thence southwest 600 feet to northeast corner of Petrel lode northwest 600 feet, to corner of same lode, thence northeast 1500 feet to corner stake marked same, thence southeast 300 feet to place of beginning, comprising 1500 feet in a southwesterly direction and ——— feet in a ——— direction, from the centre of discovery shaft and including surface [561] ground 300 feet in width on each side of the centre of said lode. The corner of the said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 15th day of August, 1878.

(Signed) EUGENE LENT,  
THOMAS ANDREWS,  
Claimants.

Montana Territory,  
Missoula County.

The undersigned being first duly sworn says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim described and posted at the discovery shaft thereon on the date therein stated.

(Signed) EUGENE LENT.

Subscribed and sworn to before me on this 16th day of August, 1878.

FRANK H. WOODY,  
County Clerk.

Filed for record on the 16th day of August, 1878,  
at 11 o'clock A. M.

FRANK H. WOODY,  
County Recorder.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, [562] affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.

By Gust Moser,  
Deputy.



## Comstock Lode No. 2.

## Notice of Location.

## Comstock No. 2 Lode Claim.

Wallace Mining District, Missoula County, Territory  
of Montana.

Notice is hereby given that the undersigned have this fifth day of August, 187—, located 1500 feet in length and 600 feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper, tin and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at the stake of centre of discovery shaft and running east 300 feet, thence 300 feet west from discovery shaft, thence 750 feet in a northerly direction, thence east 600 feet, thence 1500 feet in a southern direction, thence 600 feet west, thence 750 feet in a northern direction to the place of beginning, comprising 1500 feet in a north and southern direction and 300 feet in a east and western direction from the centre of discovery shaft and including surface ground 300 feet in width on each side of the centre of said lode, the corners of said claim being marked by posts firmly set in the ground, so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on the said claim on the 5th day of August, 1878.

JAMES HOUSE,

JOHN U. McKAY,

Claimants. [563]

Montana Territory,  
Missoula County.

The undersigned being first duly sworn on oath says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,  
County Clerk.

Filed for record on the 12th day of August, 1878,  
at 9 o'clock A. M.

FRANK H. WOODY,  
County Clerk.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my *hand the* seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.

By Gust Moser,  
Deputy. [564]

## Last Chance Lode.

## Notice of Location.

## Last Chance Lode Claim.

Wallace Mining District, Missoula County, Territory  
of Montana.

Notice is hereby given that the undersigned have the thirtieth day of July, 1878, located fifteen hundred feet in length and six hundred feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper and other metals situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at three within a few feet of discovery hole, running thence three hundred feet west, thence seven hundred and fifty feet north, thence six hundred feet in an easterly direction, thence fifteen hundred feet south and thence six hundred feet west, thence seven hundred and fifty feet to the place of beginning, comprising fifteen hundred feet in a north and southern direction and three hundred feet in an eastern and western direction from the centre of discovery shaft and including surface ground three hundred feet on each side of the centre of the said lode, the corner of said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 30th day of July, 1878.

(Signed) W. H. ERSKINE,

JAMES HOUSE,

JOHN FREDLINE,

Claimants.

Montana Territory,  
Missoula County.

The undersigned being first duly sworn on oath [565] says: that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,  
County Recorder.

Received and filed for record on the 12th day of Aug. 1878, at 9 A. M.

FRANK H. WOODY,  
County Recorder.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder,  
By Gust. Moser,  
Deputy. [566]



## Ophir Lode.

## Notice of Location.

## The Ophir Lode Claim.

Wallace Mining District, Missoula County, Montana  
Territory.

Notice is hereby given that the undersigned have this 6th day of August, 1878, located fifteen hundred feet in length and six hundred feet in width on the above-named quartz lode mining claim, bearing gold, silver, copper, tin and other metals, situated in the mining district, county and territory aforesaid, together with all mineral veins contained within the following described metes and bounds, to wit: Beginning at the stake of center of discovery shaft and running east 300 feet, thence from shaft running west 300 feet; thence 300 feet in a northern direction, thence 600 feet in an eastern direction, thence 1500 feet in a southern direction, thence 600 feet in a western direction, thence 1200 feet in a northern direction to place of beginning, comprising 1500 feet in a northern and southern direction and 300 feet in width on each side of the center of said lode, the corners of said claim being marked with posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted on discovery shaft on said claim on the 6th day of August, 1878.

JAMES HOUSE,  
JOHN U. McKAY,  
Claimants.

Montana Territory,  
Missoula County.

The undersigned being first duly sworn, on oath, says, that he is of lawful age, a citizen of the United States, and that the foregoing notice by him subscribed is a true copy of [567] the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,  
County Clerk.

Filed for record on the 12th day of August, 1878,  
at 9 o'clock A. M.

FRANK H. WOODY,  
County Recorder.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.

By Gust Moser,  
Deputy.

## Beecher Lode.

## Notice of Location.

## Beecher Lode Claim.

Wallace Mining District, Missoula County, Territory of Montana.

Notice is hereby given that the undersigned have this 5th day of August, 1878, located fifteen hundred feet in length [568] and six hundred feet in width of the above-named quartz lode mining claim, bearing gold, silver, copper and other metals, situated in the mining district, county and territory aforesaid, together with all the mineral veins contained within the following described metes and bounds, to wit: Beginning at the discovery shaft, thence running east 300 feet, thence west from discovery shaft 300 feet, thence northeast 750 feet, thence south of east 600 feet, thence southwest 1500 feet, thence north 600 feet, thence 750 feet in a northwesterly direction, to the place of beginning, comprising 1500 feet in a northern and southern direction and 300 feet in an east and western direction from the center of discovery shaft and including surface ground 300 feet in width on each side of the center of said lode, the corners of the said claim being marked by posts firmly set in the ground so that its boundaries can be readily traced. A copy of this notice was posted at the discovery shaft on said claim on the 5th day of August, 1878.

(Signed) JAMES HOUSE,  
J. G. MARTIN,  
JOHN U. McKAY,  
Claimants.

Territory of Montana.

Missoula County.

The undersigned being first duly sworn on oath says, that he is of lawful age, a citizen of the United States and that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated.

(Signed) JAMES HOUSE.

Subscribed and sworn to before me this 12th day of August, 1878.

FRANK H. WOODY,  
County Clerk. [569]

Filed and recorded on this 12th day of August, 1878, at 9 o'clock A. M.

FRANK H. WOODY,  
County Recorder.

Territory of Montana,  
County of Missoula,—ss.

I, Alvin Lent, County Clerk and Recorder of Missoula County, Montana Territory, do hereby certify the above and foregoing to be a full, true and correct copy of a mining location, together with all the indorsements thereon, as the same appears of record in my office.

WITNESS my hand and the seal of Missoula County, affixed this 9 day of June, 1888.

[Seal]

ALVIN LENT,  
County Clerk and Recorder.

By Gust Moser,  
Deputy. [570]



Friday, January 31, 1913.

**[Testimony of C. E. Woodworth, for Defendant.]**

C. E. WOODWORTH, a witness called and sworn on behalf of the defendant, was recalled and testified for the defendant, as follows:

Direct Examination.

In the last year or two I ran out the lines on section 14, township 11 north, range 16 west in the Hellgate and pointed out the lines to Mr. Welch, Mr. Fenwick, Mr. Harper and Mr. Burnett. The same gentlemen were with me when I ran out the lines from the southeast corner of section 2, township 11 north, range 16 west. I ran out the lines north between sections 1 and 2; also west from that corner between 11 and 2. I ran out the south line of section 6, township 11 north, range 15 west, commencing at the southeast corner and running west along the south line of the section. The same gentlemen were with me except Mr. McQuarrie instead of Mr. Welch. I also ran the south line of section 8, the same township and range. Mr. Harper, Mr. Fenwick and Dan McQuarrie were present when I ran that line. I also ran out the north line of section 26-11-15, and afterwards, but not when these gentlemen were present, I ran out the lines on section 26; also the lines on 22, and the other lines in the other sections that I have mentioned. I noticed coppering upon the stumps of section 26, all from the creek bottom to the edge on the cut on the west side. This coppering extended along the distance of one-quarter of a mile from the creek at the bottom and it reached an elevation of

(Testimony of C. E. Woodworth.)

probably 800 feet. There was another mill, the Dunbar and Johnson Mill, on section 23-11-15. It was located from a quarter to half a mile from this particular place where I found the coppering. That mill was in operation in 1900 or 1901. Where I pointed out these lines [571] I knew them to be the correct lines. I pointed them out correctly. As to the other mills that operated in the Hellgate Canyon, commencing at the west and working eastward on section 14-11-16, there was what was known as the Fenwick Mill, and Hammond and Baird had a mill there. On section 35, township 12 north, range 16 west, commencing next north of section 2, in township 11 north, range 16 west, Kendall Brothers had a mill there and Hadley Morrison. It was just north of the north line of section 2. It is in Cramer Gulch; on section 7-11-15, there was the Haycock Mill. On section 6 of the same township the McKean and McQuarrie Mill was located and the Morley Mill. On section 18, of that township James Tibideau and a man by the name of Tieriot had a mill. On section 8, same township, Harper and Baird had a mill; on section 16, same township, George Shoup had a mill; on section 21, same township, Harper and Baird had a mill, and on section 23, same township, Dunbar and Johnson had a mill. When I was pointing out the lines in the Blackfoot, there were others with me. Section 22, township 14 north, range 14 west, is where the Silvey claim is located. I pointed out the north and east lines of that section to Mr. Boyd and Mr. Henry Hammond,

(Testimony of C. E. Woodworth.)

and I pointed out what I knew to be the correct lines.

Cross-examination.

I think the Harper and Baird Mill, on section 14-11-16, was established in 1897. I don't know where they logged from, except that it was in that general vicinity of the mill. I think it was in 1896 that Kendall Brothers established a mill on 35-11-15. I should say the capacity of the Harper and Baird Mill and the Kendall Brothers Mill was 20,000 feet a day—each of them. I don't know when the Haycock Mill was [572] established on section 7-11-15. That was before my time. I saw the remnants of the mill there, but I don't know when it ran. From what I saw on the ground, from the sawdust there, I think the mill ran. I haven't any idea of the capacity of the mill or the character of lumber they sawed. I don't know from where they cut the timber. The McKean and McQuarrie Mill on section 6-11-15 was run in 1898. I don't know when it was established. They cut from the immediate vicinity of the mill, but from no other place when the mill was set there. This Thomas Tibideau Mill was on section 18-11-15. It was a small mill, established, I think, in 1907. The Harper and Baird Mill on section 8-11-15 ran in 1897 or 1898. The George Shoup mill was established sometime in 1890. As to the Harper and Baird Mill on section 21-11-15, they moved from one place to another within six or eight months. It was a small portable mill, with a capacity of, I should think, 20,000 feet a day. The Dunbar and Johnson mill on section 23-11-15, was established in 1900 or

(Testimony of C. E. Woodworth.)

1901. I do not remember whether on my examination of section 26-11-15 there were any stumps that were not coppered. I was not making an examination at that time to determine whether or not there were some stumps that were coppered and some that were not. I just casually noticed that some of the stumps were coppered. I could not tell whether if scaling had been made all of the stumps were counted or only a part of them. The characteristics as to age or condition of preservation of these stumps that were coppered—they all showed evidences of having been cut sometime; they showed evidence of age. The Dunbar and Johnson people cut in that Tyler Gulch; they did not cut on the flat—the timber had been cut there. In [573] Tyler Gulch, on section 23-11-15, the flat timber had been cut years before. Section 26-11-15 does not come down to the flat—it is all up in the gulch. When I pointed out the lines of the Silvey claim to Mr. Boyd and Mr. Henry Hammond, we went over the cutting and we went over the cutting on the east half of the northeast quarter of section 22-14-14. I don't know whether I went any east of section 22-14-14; if I did, it was only a short distance. I found the old cutting on section 22 and it extended over on to section 23 adjoining on the east. There was quite a swing around in there and it swung out east of said section 22. There might have been some of the stumps coppered on this east half of the northeast quarter of section 22, but I did not pay any attention to the coppering; I was not looking to see the extent of the cutting; I



(Testimony of C. E. Woodworth.)

know what was the extent of the area that had been cut over. The stumps were old stumps.

### Redirect Examination.

I cannot tell the difference between a stump that has been cut nine years and a stump that has been cut eleven years. I could not tell the difference between a stump that has been cut nine years and a stump that has been cut fifteen years, unless there was something unusual about it.

### **[Deposition of Robert L. Harper, for Defendant.]**

The deposition of ROBERT L. HARPER, a witness called and sworn on behalf of the defendant, was offered and read in evidence by the defendant, as follows:

I am the same gentleman who testified in this case as a witness called and sworn on behalf of the plaintiff on August 7, 1912. I recall testifying at that time, in substance, that I cut about three or four hundred thousand feet [574] of logs in what was known as Welch's Gulch, logged east of the Beaver Tail Hill and skidded those logs at the foot of said Welch's Gulch. I recollect testifying at said time, that I was testifying from my recollection of events in 1889, and that I had not been in the vicinity of where those logs were cut since the lines had been run by the Government survey. Since so testifying I have visited the gulch I called Welch's Gulch. On such visit, I determined where such Welch's Gulch was and where my cutting and skidding had been done in reference to the Government survey. I made

(Deposition of Robert L. Harper.)

this visit on the 29th or 30th of August, 1912—a week ago to-day. At that time I located the line running between sections 1 and 2, in township 11 north, range 16 west. In reference to sections 1 and 2, said township and range, I found the upper end of the so-called Welch's Gulch was located as to the upper end of it on section 1; the line crosses below where we camped—just below the camp before you go up the hill, then it runs up the hill toward the west, then it runs south and west and south. The mouth of said gulch in reference to said Government subdivision, is just a little west of the corner—the mouth of the gulch is southwest of the corner of section 2. I observed the territory that I have testified to on the 7th of August, 1912, as having been cut over by me, and I am now in a position to state that the cutting that I testified to as having been done on Welch's Gulch was done on section 1, excepting there might have been a few cut in section 36, in township 12 north, range 16 west. I would not swear positively that there was not some cut on the said section 36. I know where Marcellus Gulch is. I became familiar with that in 1898. I worked once in that gulch for Harper and Baird. I worked there in the fall of 1898 and until March, 1899. [575] At the time I worked there, I do not think the government lines were surveyed out on the ground. Since I worked in Marcellus Gulch I went up there the other day and they showed me where some lines were in section 8, township 11 north, range 15 west. The line that was shown me at that time was the south line of

(Deposition of Robert L. Harper.)

said section 8, running east and west.

Q. Who pointed that out?

A. There was Mr. Woodworth there and Mr. Wills, the man who owns the land.

(Witness Continuing:) In view of my present knowledge of where the south line of section 8 is and its relation to Marcellus Gulch, I now testify that when the timber was cut when I was working there in the fall of 1898 and the spring of 1899, they cut over as far down as there was any timber. They came down as far as they had any timber, about a quarter of a mile below they had the timber; then they worked up about two miles above the mill that winter, and up the gulch and ridge that came into that gulch. By them, I mean Harper and Baird. The mill I have testified to was located half a mile up the gulch above the said south line of section 8. As to the number of thousand feet of logs that I hauled in this gulch—they probably cut in my time of being there two million or two million and a half feet. There was a gradual slope down from the mill to the east line of section 8. We hauled some logs up this gulch. I wouldn't say positively how much was hauled up to the mill, but I should judge about two or three hundred thousand, maybe a little more, I would not say positively. We hauled there a couple of weeks and used two or three teams. There was no difficulty in hauling these logs up the gulch, to the mill, if only small loads were hauled. The time I commenced [576] logging operations in this gulch there was no evidence of old logging

(Deposition of Robert L. Harper.)

roads as far as the mill. I testified that I commenced our logging in that section about a quarter of a mile from the line at the south side of the section. I found possibly a few trees cut south of the point where I commenced my operations. We were as far as there was any timber grew down the gulch. I could not state how far these logging operations of Harper and Baird extended beyond the gulch. Possibly we went over on the east side of the gulch—we went over that in to another gulch. I don't know how far they went, probably a mile and a half. From the setting where that mill was, I think our operations ran up about a mile and a half; after I left there they moved; I don't know anything about their cutting. On the west side of the gulch, we cut the slope that came towards the mill, probably a quarter or half a mile. I don't know just—whatever sloped in towards the mill.

#### Cross-examination.

I came to make this trip out over the land again because George W. Fenwick sent for me. Mr. Fenwick is the man who operated the sawmill at the time I was there when I was logging out of Welch's Gulch. That is not the Welch Gulch on section 14, in township 11 north, range 16 west—that is another gulch. The Welch Gulch I now refer to is the first gulch of any importance east of Cramer Gulch. I did not know at the time I cut out of Welch's Gulch that it was located on sections 1 and 2, in township 11 north, range 16 west. I didn't know anything about the section lines then. I didn't cut any out of



(Deposition of Robert L. Harper.)

the Cramer Gulch. When I went to cut out of Welch's Gulch, no one directed me where to cut. I had a roving commission from Fenwick to cut anywhere I wanted to—that is [577] how I happened to be cutting there. Fenwick told me to cut anywhere I wanted to up in that country. There was no particular section or quarter section designated by anyone that I should cut from. There was no public survey in there at that time, as I know of. I didn't know any section line, nor section corners. We cut just about a mile north from the mouth of the gulch. There had been some cutting, a little done in there before I was in there. Practically all of that Welch Gulch lies in what I now know to be sections 1 and 2, in township 11 north, range 16 west. The west slope of the gulch lies over the line on section 2 until you get about half a mile up, then it runs up on top of the hill and into section 1.

Q. Did you do any cutting on this part that goes over on to section 2?

A. We cut on the right-hand side of the gulch—practically all we cut.

(Witness Continuing:) I don't know who cut on the left-hand side; we cut on the further back end of that cutting. There was already some old cutting there in Welch's Gulch when I went there. I don't know who cut there. From the appearance of the stumps this old cutting had been done on the left-hand side of the gulch probably two or three years before my cutting. I do not know where these logs went to that had been cut from there—that was my

(Deposition of Robert L. Harper.)

first work in the country. I just came. My cutting was done up the hill from the mill—the logs went to the river. Having looked over these section lines, I want to swear positively that I did not cut any on section 2 out of Welch's Gulch. I can tell at this late date as to whether or not I cut on section 1 or 2, inasmuch as it must have been a half or three-quarters of a mile from the mouth of the gulch to where I cut any logs and by the time you get up that far, the line runs up on top [578] of the hill. I only cut on the right-hand side as you go up the gulch—probably only cut over towards the Strong Gulch. The Strong Gulch lies to the right-hand as you go up the gulch; that would be to the east. I think I cut in the neighborhood of about three or four hundred thousand feet out of this gulch on section 1. I say that the cutting that was done on this gulch on the left-hand side as you go up, which would be on section 2, was done some two or three years prior to the time I cut on the right-hand side. The older cutting was done before I went there. I went clear to the back end.

Q. The older cutting was on section 2?

A. There was a lot cut on section 1, too.

Q. The great body of it had been cut on section 1?

A. Might have been some of it, yes.

Q. Was there, or was there not?

A. I could not say.

(Witness Continuing:) I expect there might have been a few trees cut on section 2—after you get up the hill until it went over the top; I expect in the

(Deposition of Robert L. Harper.)

neighborhood of sixty acres on the west side of that gulch was included in section 2. Part of that sixty acres there never was any timber on. I could not say positively how much there was timber on, there would be twenty acres; at the upper end there was timber on twenty or thirty acres and that twenty or thirty acres was cut when I got there, and I say this timber had probably been cut two or three years before I cut there. I do not know of any sawmill in that vicinity other than the Bonita Mill to which this twenty or thirty acres might have been logged during that time. There was no other mill there that I know of. [579]

Q. You know, do you not, that there was no other mill in that vicinity to which these logs that had been cut off of section 2 might have been logged, do you not? A. No, I do not.

(Witness Continuing:) I was in that vicinity first in 1888 and 1889 logging—the fall of 1888 and the spring of 1889 and I do not believe I ever saw any evidence of any other mill around there. When I went out over the Marcellus Gulch the other day with Mr. Fenwick and Mr. Woodworth, I didn't examine all the lines or corner-stones. I just went up to the fence and Mr. Wills told me that was the line. I learned from somebody the other day that that was the definite south line of section 8—11—15. It crosses the gulch in back of the Hauswirth house. I am not positive that that is the south line of section 8. Mr. Wills told me it was, I was not at the corners on that. I don't know that of my own knowledge from any

(Deposition of Robert L. Harper.)

independent examination made by myself whether that is the line. It was the spring of '98 and '99 that I cut out of Marcellus Gulch for Harper and Baird. I was not a member of that firm. My brother was the Harper and Tom Baird was the Baird. I was working for them by the month. I think I got \$50.00 a month wages. The timber that was then logged by me out of the Marcellus Gulch was sawed by Harper and Baird. They sold it to J. T. Carroll of Butte. They came to cut out of Marcellus Gulch for they had a contract in Butte with Mr. Carroll and they just went there and got the lumber. At that time lumber was very cheap and they were following the fir; they could get a little more for it. All I cut out of Marcellus Gulch was not cut off section 8. I could not give you any idea of the amount [580] cut off section 9; I think they cut all they could get that sloped towards the gulch. Mr. Wills told us that the center of section 8 was right by the millsite. He was with us and he owned some of that land. There had been no other cuttings before my time in Marcellus Gulch that I noticed. I don't think there was; there was no road up there, they had to make a road to get the mill in. As to the completeness with which I cut out that Marcellus Gulch, they cut all they could get that came in the slopes of the gulch; they went out of the gulch in several places where it was low draws and they could get over. I could not say what right I had to cut there. Nobody directed me to cut. I got my authority and directions from Harper and Baird.



(Deposition of Robert L. Harper.)

I could not tell you the value of the timber that was cut out of Marcellus Gulch, but I think they were getting about \$7.00 a thousand at that time on board the cars at a place they called Baird's Spur at that time, which is five miles east of Bonita. Mr. Woodworth showed me where the section lines were between sections 1 and 2-11-16. We went to the corner, drove right up to it with the automobile. I examined the corner myself. I traced out the line north up the hill. Mr. Fenwick was in charge of the Bonita Mill when I cut off section 1-11-16. I don't know what his relation to the mill was. I received all my orders and instructions from Mr. Fenwick. We commenced logging there in 1888. I do not know how long Mr. Fenwick had owned that mill when I commenced to work for him. I was paid for logging off section 1 by Fenwick giving me an order to the Missoula Mercantile Company—a check we called it at that time—and it was paid through the Missoula Mercantile Company. I could get no pay—no money—up at the works; you could get goods or anything of that kind. Mr. Fenwick was right on the ground [581] and in immediate charge of the mill at that time. Mr. Graham was there—he ran the woods at that time for Mr. Fenwick, the way I understood it. I was a stranger in the country myself at that time; the first work I did in Montana was in 1888.

#### Redirect Examination.

Mr. Woodworth was also on section 8-11-15 at that time. He also pointed out to me the location of

(Deposition of Robert L. Harper.)

the different lines on it to which I have testified.

Recross-examination.

I could not say positively of my own independent knowledge of any particular point I was shown on section 8, but Mr. Wills, the owner of the land, that was with us, said it was section 8. That is all I know about it.

**[Testimony of A. B. Hammond, on His Own Behalf.]**

A. B. HAMMOND, a witness called and sworn on behalf of himself, testified as follows:

Direct Examination.

I reside in San Francisco; I am the defendant in this case; I am sixty-four years old; I have lived in San Francisco since 1900; I have lived in the State of California a portion of the time in 1888, 1889, 1890 and 1891. I first went to the State of Montana in 1867, and to the town of Missoula in 1868—but I went there to live in 1872. My first occupation when I went to the town of Missoula to live was employment by E. L. Bonner & Company. There was a firm known as E. L. Bonner & Company at that time in Missoula; that was not the same firm of E. L. Bonner & Company that afterwards had transactions with the Northern Pacific Railroad Company. In 1872 Missoula had about four hundred inhabitants. [582] In 1876 I became a member of a firm known as Eddy-Hammond & Company. That was a partnership composed of E. L. Bonner, R. A. Eddy and myself. That firm continued in business under that name until August, 1885. There was no other per-

(Testimony of A. B. Hammond.)

son interested in the firm of Eddy-Hammond & Company at any time from its inception to August, 1885, than those whom I have mentioned. During all of those years the firm was engaged in a general merchandise business. We dealt largely in horses and cattle. As a firm we bought and sold horses at that time. We hauled our goods and merchandise from a town near Ogden on the Union Pacific into Missoula. Concerning a barn or stable that has been mentioned in the testimony, that barn was built in the early '80's, perhaps a little later. The relationship this firm of Eddy-Hammond & Company bore to the former firm of E. L. Bonner & Company was this: Mr. Bonner and Mr. Eddy composed the firm of E. L. Bonner & Company. They were members of the copartnership of Eddy-Hammond & Company. When the firm of Eddy-Hammond & Company was formed, it took over the assets of the former firm of E. L. Bonner & Company. The copartners forming the firm of E. L. Bonner & Company in Deer Lodge were E. L. Bonner and J. H. Robertson, and at Butte the copartnership was E. L. Bonner, J. H. Robertson and M. J. Connell; the gentleman last mentioned is the present Fish and Game Commissioner of California. In Missoula the firm of E. L. Bonner & Company was R. A. Eddy and E. L. Bonner. I was not interested at any time in either of the houses that I have mentioned, other than at Missoula. My only interest was in Missoula. I had clerked for E. L. Bonner & Company four years before I became interested. The business of

(Testimony of A. B. Hammond.)

Eddy-Hammond & Company was done almost entirely on credit. The course of [583] business transacted by the firm of Eddy-Hammond & Company during its existence in the matter of extending credit was as follows: At the commencement of their business, and in fact, during the existence of the co-partnership, their business was largely with the farmers, with the miners and with the fur traders. We had a large Indian trade, which extended as far north as the British line; we also had some dealings with the small sawmills and flour-mills that were in the country at that time. As I say, the business was largely done on credit, and when we supplied customers with goods, we generally had to finance them and take care of them until such time as they could sell their crops or their furs or until the stock raiser could sell his cattle. We advanced them provisions or we advanced them money. We advanced them money to pay their taxes and paid their men. At that time there were farmers in the vicinity who were our customers; it was quite an agricultural country. We had quite a large farming trade in the Bitter Root Valley and in the matter of the payment of men, this method extended to the farmers as well as our other customers. The method by which credit was extended, with reference to the form of the paying out of goods or money, was as follows: We credited, for instance, different farmers; if one farmer was indebted to another and didn't have the money to pay him, he would frequently give an order on Eddy-Hammond & Company to have his account



(Testimony of A. B. Hammond.)

charged up to the party's account who gave the order. That was so general in that section of the country that transactions of that kind came to be known as Bitter Root turns. In a sense, one man advanced money to pay another man's debts. He sometimes collected a bill from the farmer, but did not get any money; it was charged up to another farmer, to another customer. There were sawmills in this country in the State of Montana in that [584] vicinity prior to the inception of the Northern Pacific Railway; we had dealings with sawmills at that time. We advanced them goods and we dealt with the sawmills the same as we dealt with the farmers and stockmen. In reference to the payment of their men, they gave orders on our firm for the payment of their men, which we accepted and paid and charged up to them. At no time was the firm of Eddy-Hammond & Company a dealer in lumber. It did not buy or sell lumber at all. The firm of Eddy-Hammond & Company sold out its business to the Missoula Mercantile Company in August, 1885. After its organization, the Missoula Mercantile Company carried on business along the same lines that Eddy-Hammond & Company had carried it on; it extended credit to the farmers, stockmen, sawmill men, contractors and builders of the railroad, traders and miners; it continued to do the same class of business. In the matter of extending credit, both for money paid out and for goods, wares and merchandise purchased—we accepted orders from the customers. In fact, it was necessary in that country,

(Testimony of A. B. Hammond.)

at that time, when you undertook to carry a customer that you had to furnish him money to pay his men and to do his business until such time as he could raise his crop or sell his product and pay his bills. There was no difference in the method of extending credit practiced by the Missoula Mercantile Company from that practiced by its predecessor, Eddy-Hammond & Company. The Missoula Mercantile Company never dealt in lumber; it never owned any sawmills, nor did it ever own any stock in any corporation interested in sawmills. I have testified as to a second firm of E. L. Bonner & Company different from the first that at Missoula was merged into the Eddy-Hammond & Company. The second firm of E. L. Bonner & Company was a [585] copartnership that was entered into in 1881 for the purpose of contracting with the Northern Pacific to furnish it with ties, piles and lumber and clearing the right of way for about two hundred and eighty miles of the road on the main line of the Northern Pacific. E. L. Bonner, J. H. Robertson, R. A. Eddy and myself were the members of that firm.

Q. I hand you a certified copy of a document issued by the Department of the Interior (hands witness document), and I ask you whether or not that is a document having any relation to the copartnership of E. L. Bonner & Company, the firm just designated by you?      A. Yes.

The COURT.—You are asking the witness now about the second firm of E. L. Bonner & Company.

(Testimony of A. B. Hammond.)

Mr. WHEELER.—The one that did the railroad work.

(Witness Continuing:) That was organized before the Missoula Mercantile Company, which was organized in 1885, after the railroad was built.

Defendant thereupon offered in evidence the said document, constituting the appointment of this firm of E. L. Bonner & Company as agent for the Northern Pacific in the selection of timber and cutting there, which said document was marked Defendant's Exhibit "Q," and is in the words and figures following, to wit: [586]

**[Defendant's Exhibit "Q"—Appointment of E. L. Bonner & Co. as Agent of Northern Pacific, etc.]**

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., September 29, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copy of appointment of E. L. Bonner, J. H. Robertson, A. B. Hammond and R. A. Eddy as agents of the Northern Pacific Railroad Company, to procure timber from the public lands for construction purposes, dated New York, Sept. 23, 1881, is a true and literal exemplification of said paper on file in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day

and year above written.

[Seal]

WM. A. J. SPARKS,

Commissioner of General Land Office.

E. L. Bonner, J. H. Robertson, A. B. Hammond and  
R. A. Eddy:

You are hereby appointed agents of this Company for the purpose of procuring and taking from the public lands adjacent to the line of the Northern Pacific Railroad, timber necessary for, and to be used in, the construction of said railroad in the western part of Montana Territory, under the direction of the engineer in charge of the work of construction and as required by him for such construction.

The right, power and authority of the Company to take from the public lands, material for the construction of its railroad, are granted by the charter of the Company (Act of Congress of July 2nd, 1864); nevertheless the circular of the Commissioners of the General Land Office, dated July 15, 1881, specifying the right of railroad companies, under the act of [587] March 3rd, 1875, except clauses numbered 6 and 7 thereof, will be regarded by this Company as applicable to the exercise of the like right granted to it by the charter. A copy of the circular referred to is herewith enclosed; and you are required to comply strictly with its provisions, except those contained in the clauses numbered 6 and 7, as above mentioned.

Your appointment is subject to revocation, at any time, and without notice.

You will acknowledge the receipt of this letter and



the enclosed "circular" to the engineer in charge of the work.

Yours,

T. F. OAKES,

Vice-president.

New York, September 23, 1881.

CIRCULAR.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., July 15, 1881.

To Registers and Receivers United States Land Office and to Special Agents of the General Land Office:

Gentlemen: The first section of the Act of Congress approved March 3rd, 1875, 18 Stats., 482, granting to railroads the right of way through the public lands of the United States, provides that any railroad company organized as therein described, shall have "the right to take from the public lands adjacent to the line of said railroad, material, earth, stone, and timber necessary for the construction of said railroad." [588]

In determining the rights of the railroad companies under the foregoing provision, you will be governed by the following instructions:

1. Said provision refers exclusively to contemplated or unconstructed roads. Companies have no right to take timber or other material, under this act, for repairs or other future improvements of roads already constructed.

2. The right granted to any railroad company un-

der this act, to take material from the public lands "adjacent to the line of said railroad," is not restricted to lands within any definite distance from the line of the road, to the nearest or most convenient points opposite the line of the road and within the terminal points of the road.

3. It is not necessary that the required material be taken at right angles with or opposite to the exact points at which the work of construction is being done, but said material may be taken from such points as are nearest or most accessible to some part of the road, measuring from the line of the road. The same rule that would apply to the removal of earth for use in the construction of a road is equally applicable to the procurement for the same purpose of the necessary stone or timber. Stone or timber may therefore be taken from the public lands opposite the line of the road within the termini thereof, and carried forward and distributed as required in the progress of construction.

4. The right under this act to take material from the public lands for the construction of railroads is granted to railroad companies organized according to the provisions of this act, and to no other parties. Railroad companies have no power to give general authority to the public to cut timber [589] from the public lands, nor has Congress ever given such authority to the public.

Individuals controlled and directed by a railroad company, or by the contractors of such company, for building its roads and for whose act the company is and can be held responsible, will be deemed the

agents of the company within the meaning of this act.

But individuals cutting timber from the public lands and selling the same to a railroad company at an agreed price are not agents of the company. In such a case the railroad company would have no authority to direct the place where, or the manner in which, the timber should be taken, nor any control whatever over the individuals cutting the timber, nor could it be held in any way responsible for the conduct of such individuals.

Only those persons, therefore, who are the direct, duly authorized agents of a proper railroad company can represent the company in the exercise of the rights granted to such company under this act. Persons who merely contract to cut and deliver to a railroad company ties or other timber at certain rates per tie or quantity, and for whose acts the company is not responsible, have no authority to take the timber from the public lands even for delivery to a railroad company authorized to take such timber by its proper agents. Such unauthorized persons will be deemed trespassers on the public lands and must be proceeded against accordingly.

5. Each right of way railroad company must arrange for procuring the material authorized to be taken in such manner that it may be held responsible for any unlawful taking of materials or waste of public property. [590]

6. In all instances wherein a railroad company desires to take large quantities of earth, stone, or timber, under the provisions of this act, from any

(Testimony of A. B. Hammond.)

one particular spot or vicinity, the proper officer or duly authorized representative of said company must make application in writing to the Commissioner of the General Land Office, through the Register and Receiver of the proper land district, specifying, under oath, the kind of material required; the purpose for which it is desired; the probable amount or quantity needed and designating the public lands from which the material is to be taken, describing the lands, if surveyed, by section, township and range, or if unsurveyed, indicating their localities by reference to some well known point.

7. The Register and Receiver will transmit such application to this office in special letter, with their report thereon, for appropriate action.

8. The lands from which material is authorized to be taken under the act, are the vacant, unoccupied public lands of the United States, not reserved or otherwise appropriated.

N. C. McFARLAND.

Commissioner.

Approved July 19, 1881.

S. J. KIRKWOOD.

Secretary. [591]

(Witness Continuing:) This appointment was never revoked. The J. H. Robertson named in said document, Defendant's Exhibit "Q," is the J. H. Robertson that I have testified to, was a partner in the new firm of E. L. Bonner & Company, and Mr. Eddy and Mr. Bonner are the same Mr. Eddy and Mr. Bonner who were partners in Eddy-Hammond



(Testimony of A. B. Hammond.)

& Company. Mr. Robertson never had any interest at any time in the firm of Eddy-Hammond & Company. The Northern Pacific was under construction in this particular country in 1881 and late in 1883 the road was joined together, but was not completed until along in 1885. By "not completed" I mean the bridges were temporary. The construction was joined together and they ran trains over it in 1883. The Northern Pacific at that time was apprehensive of losing its land grant and it had to push through and get the road completed, and they did the work as fast as they could, in order to hold the grant. It was what might be called temporarily complete in 1883 and more permanently complete in 1885. Concerning the construction of temporary bridges by the Northern Pacific Railroad—the railroad engineers knew but little about that section of the country through which the road was being built. For instance, when they came to a gulch where there was a large watershed, they did not know what the volume of water would be that would collect and run down there when the snow melted in the spring; and instead of filling it up with earth, they went across the low places with piles, intending later on, as the situation developed to fill them in with work trains when they could tell how large an opening they would have to leave to let the water run into the river. After the firm of E. L. Bonner & Company undertook this contract, [592] the first timber located adjacent to the right of way coming from the east that was of any conse-

(Testimony of A. B. Hammond.)

quence, was at McCarty's Bridge, about eight or ten miles, probably eight miles, east of Bonita. Tyler's Gulch is near by to McCarty's Bridge, and that is where the first timber is encountered coming from the east. Going west, the road ran out of the timber at Bonner. In this particular section, the firm of E. L. Bonner & Company, under contract, supplied, for the use of the Northern Pacific Railroad Company in construction along the line, under one order, 5,000 piles. We had additional orders afterwards, and I would say that we have gotten out at least twenty thousand piles in that section. These piles that we got were taken adjacent—as near the line of the road as we could get them, where we could get them the cheapest. They were all taken along the line of the Hellgate between the town of Bonner and Tyler's Gulch. A great many were taken around Bonita. At Wallace, west of Bonita, there was a sawmill, and at Turah there was a sawmill. At other places they wanted lumber for bridge timbers and consequently they contracted for piling where we had no mills—where we were not operating any mills. We took piling along the Hellgate River from the flats between what was afterwards the Bonita Mill and Tyler Gulch. We took it from the flats first. Wherever the flat country was timbered, we took piling because it was nearest to the line of the railroad, and as a rule, the railroad followed the bottom. This piling was peeled in some cases and in other cases it was not peeled. As to whether or not where a mere stump was left after the taking

(Testimony of A. B. Hammond.)

of the piling, the appearance of the stump was any different from that of the appearance of a stump that had been cut for a sawlog—our [593] pile specifications were for not less than 10 inches at the tip and not more than 20 inches at the butt. Our piles were gotten out from thirty to sixty feet long and in some instances longer. Now, a tree of that kind would make a good many sawlogs if sawed up. The stump would not look any different from a tree cut for a sawlog. I knew of a mill called the Haycock Mill. I know that in the vicinity of that mill, up and down the Hellgate River, logs were sawed for bridge timbers at that mill and utilized in the construction of the railroad. I know of my own knowledge that piling was taken from the lands along the Hellgate, both east and west of Bonita Station and moved to points east and west beyond the right of way which we had the contract to clear. Our contract was that we were to furnish the lumber and piles and ties anywhere along the right of way, wherever it could be delivered most conveniently. I was at a place called Wallace. In the first instance a man by the name of Katchin owned mills there. At the Katchin Mills lumber was sawed and was used as bridge timbers by the Northern Pacific Railroad in the construction of the road—that was the principal place of supply. Practically all of the roundhouse, depot and section-house timbers were furnished from that particular mill. I recall a corporation called the Montana Improvement Company. It was incorporated in 1882. The railroad

(Testimony of A. B. Hammond.)

business of E. L. Bonner & Company was taken over by the Montana Improvement Company. The principal office of the Montana Improvement Company was at Deer Lodge. E. L. Bonner was the president of that corporation. As to the stockholders of that corporation—the Northern Pacific owned fifty-one per cent; a man by the name of George Conklin—\$250,000—he had twenty-five hundred [594] shares. My proportionate interest in the Montana Improvement Company was about one-fifteenth of that corporation. That corporation acquired the Wallace Mills; it also acquired the mill known as the Thompson or Allen Mill, which was subsequently set up at Bonita. The persons I have named as stockholders of the Montana Improvement Company remained stockholders during the existence of the corporation after the Northern Pacific acquired its interest in the corporation—there were slight changes, if any. During all the time that I was a stockholder of the corporation, the interest of the Northern Pacific Company therein did not change. The Montana Improvement Company owned lumber yards. They had a yard at Butte, a yard at Helena and a yard at Deer Lodgs. That corporation commenced the construction of a dam on the Blackfoot River in the winter of 1884. The dam was not completed; it went out in the flood of 1885—in the spring. The remnant of the Company's dam on the Blackfoot was sold to W. H. Hammond. This Thompson Mill that I have spoken of was sold to Fred A. Hammond. The Montana Improvement



(Testimony of A. B. Hammond.)

Company erected that mill at Bonita. It sold the *the* mill to Fred Hammond and agreed to erect it at Bonita and set it up for him—sold it and set it up for so much. Mr. E. L. Bonner at the time of the incorporation of the Montana Improvement Company resided at Deer Lodge—the headquarters of this corporation. He continued to reside there for a number of years, but during the building of the Northern Pacific Railroad he spent a great deal of his time in Missoula, and shortly after its completion he decided to move to Missoula and did build a house and move there. Mr. E. L. Bonner was at all times president of the Montana Improvement Company. When Mr. Bonner moved from Deer Lodge to Missoula, the principal [595] place of business or office of the Montana Improvement Company was moved to Missoula. The office was moved to Missoula in the fall of 1885. The Montana Improvement Company operated the Wallace Mill. It operated that mill from the fall of '84 until some time in 1885. I don't think it cut sawlogs after the summer of '85. It did no cutting after that time. The Montana Improvement Company had a shingle mill at Noxon, which place is probably one hundred miles west of Missoula. The product of the shingle mill—the shingles—were used for the section-houses and roundhouses. It was a small mill that cut cedar shingles. The Montana Improvement Company never operated the mill at Bonita. It never operated any mill up the Blackfoot. The Montana Improvement Company went into active business in

(Testimony of A. B. Hammond.)

1884 and went out of active business in 1885. While it was incorporated in 1882, it did not start active business until after the railroad was completed. It ceased operations in 1885 and in July, I think it was, 1885, there was a meeting of the directors at Deer Lodge and they decided to go out of business. When the Montana Improvement Company ceased active business, in reference to its properties and plants, it decided to go out of business and sold them. Decided to sell the property and liquidate the business. One of the mills at Wallace was sold and moved away. The other continued to operate there until, I think, a few months later, perhaps in the spring of 1886, was disposed of or moved away. The shingle mill was burned down. The different lumber yards that I have mentioned were sold. The Helena Lumber Yard was sold to B. H. Coombs. After Coombs purchased the Helena lumber yard, he ran it a while under his name and then incorporated it under the name of the Helena Lumber Company. I never had [596] any shares of stock in the Helena Lumber Company, nor had I any interest with Mr. Coombs in the Helena Lumber Company. The lumber yard was sold to Coombs in 1885. I could not say when the Helena Lumber Yard was incorporated, but perhaps it was a year or two after it was sold to Coombs. The Montana Improvement Company had absolutely no interest in any of the lumber yards which it had owned prior to the sale that I have spoken of or in any one of the mills that I have mentioned in my testimony after their sale

(Testimony of A. B. Hammond.)

or other disposition that I have testified to. They decided to go out of business and liquidate. The Missoula Mercantile company did not acquire, either directly or indirectly, any interest at any time in the Bonita Mill, the mill constructed on section 14—in the Hellgate; nor did it any time, either directly or indirectly, acquire any interest in the Blackfoot Mill or property or dam, or any of that property on the Blackfoot, which I have testified the Montana Improvement Company sold to Henry Hammond. Mr. Bonner and Mr. Eddy conducted the negotiations for the sale of that property on the Blackfoot to Henry Hammond. I did not participate in any of these negotiations. I declined to participate. I did not participate in the negotiations that led to the sale of the mill at Bonita to Fred Hammond. The same parties—Mr. Bonner and Mr. Eddy conducted those negotiations. I knew that they were negotiating with Fred A. Hammond, but I declined to participate in the negotiations. I heard or learned of the sale of the Bonita Mill by Fred A. Hammond to George W. Fenwick. I did not participate in the negotiations that led to the sale by Fred A. Hammond to George W. Fenwick of the Bonita Mill. I have a very slight recollection on the subject that has been testified to to the effect that Mr. Hathaway [597] went out and made an inventory of the matter of that transfer or concerning Mr. Hathaway's testimony that he believed I sent him there. My recollection is that Fred A. Hammond and Mr. Fenwick had negotiated and they came to an under-

(Testimony of A. B. Hammond.)

standing by which the mill would be sold by Fred Hammond to Mr. Fenwick, and that they had agreed on Mr. Hathaway to take the inventory for them and assist them. I have no recollection of sending Hathaway there or telling him to go there or anything of that kind. If he had requested me to do so, I might have—whether I so did or did not, I do not recollect. I did not have, either directly or indirectly, any interest in the Bonner Mill at the time that same was acquired by Henry Hammond. I did not have any interest, either directly or indirectly, at the time that the Bonita Mill was acquired by Fred Hammond, any more than the interest—the interest I represented in the Montana Improvement Company and the interest I had in the sale of the mill to Fred A. Hammond. Beyond that, I did not acquire any interest of any kind by reason of that transaction. When Fred A. Hammond sold to George W. Fenwick, I did not, either directly or indirectly, acquire any interest in the mill, business, or property that G. W. Fenwick thus acquired. I did not ever individually at any time own any interest in either the Blackfoot property or in the Bonita property with Henry Hammond or Fred A. Hammond or George W. Fenwick. I did not ever share in or participate in the profits of either the Blackfoot or the Hellgate property while the same were being operated by Fred A. Hammond, George W. Fenwick or Henry Hammond, prior to the organization of the Blackfoot Milling and Manufacturing Company. I did not at any time ever par-



(Testimony of A. B. Hammond.)

ticipate in any of the profits of the Bonita Mill or property while the [598] same was being operated by George W. Fenwick or Fred A. Hammond, or at any other time.

The Missoula Mercantile Company was never at any time interested in either of those companies or in the profits derived from the conduct of the business there. The Blackfoot Milling and Manufacturing Company was never at any time interested in the business of the Bonita Mill, either while owned by Fred A. Hammond or George W. Fenwick, or at any other time. The Big Blackfoot Milling Company was never at any time interested in the property or profits of said mill under said management, or at any other time. As to my occupation and place of business from the year 1885 to and including the year 1895—in 1885 and 1886 I became associated with some gentlemen in a syndicate having for its object the building of railroads, that would act as branch lines or feeders to the Northern Pacific. We built the Bitter Root Railroad, running from Missoula to Grantsdale, about fifty miles. We built from Phillipsburg to Drummond a railroad running from Drummond to Phillipsburg. We built a road from Helena to Remini and to Marysville; we also built a road from Laurel to Rocky Ford, in Montana. I had a four-ninths interest in the contract that built the railroad from Laurel to Butte, a distance of seventy-one miles. I stated that we built a road from Laurel to Rocky Ford. We built a road into the Rocky Ford country. I forget the name of the

(Testimony of A. B. Hammond.)

place we started from, but it was not Laurel. This was all between 1885 and the summer of 1889. In 1894, I went to Oregon and bought the Oregon Pacific—reconstructed it. I was in Oregon from 1894 until I came to California to reside permanently. In 1894 I commenced building the Astoria and Columbia River Railroad. As to my principal absences from the State of Montana during the period of [599] 1885 to 1896—I was in California during the winter of 1888, 1889, also 1890 and in the summer of 1891. Sometime in the summer I moved to Oakland, and lived on Jackson Street, until 1892. I was in Europe for seven months in 1892. My absences in California in the winters I have mentioned comprised about three months in 1888 and a longer period in 1889 and 1890. While I was in Montana engaged in railroad construction, I lived in Missoula until 1888. The headquarters of our railroad operations were in Helena; during the years that I named, my business took me to Helena frequently. I had a real estate business in Helena, put up some buildings, but Helena was the headquarters of these syndicates that I have spoken of that built these railroads. In reference to the construction of these railroads in Montana and the time I spent away from Missoula in connection with them, I think probably a half or a third of the time I was absent from Missoula. Concerning the Blackfoot operations, I remember the organizing of the Blackfoot Milling and Manufacturing Company. I remember a transaction that it had with Henry Hammond with regard

(Testimony of A. B. Hammond.)

to property on the Blackfoot, I was a stockholder practically from the inception of the Blackfoot Milling and Manufacturing Company. It itself never operated any mill upon the Blackfoot River. It acquired the plant at Bonner that had previously been operated by Henry Hammond. It was incorporated for that purpose, and acquired that property practically immediately on its organization. After it acquired the property, it never operated on the Blackfoot itself. The corporation had other milling business than the business on the Blackfoot. It had three or four small portable mills along the line of the Bitter Root Railroad that were put in at the time of the construction of the road for the purpose of sawing lumber and to build the same. The Blackfoot Milling and Manufacturing Company [600] operated these mills in the Bitter Root for a period of time between the time of its incorporation and the sale of the Blackfoot property to the Big Blackfoot Milling Company. The Bitter Root Railroad was completed in 1888, and sometime after that and after the Blackfoot Milling and Manufacturing Company was organized, these little mills were sold by the syndicate that built the Bitter Root Railroad to the Blackfoot Milling and Manufacturing Company. That company operated them until such time as they cut out the settings. By a setting, I mean a small amount of timber. Timber grew upon the lands that had been taken up by the settlers and patented in the Bitter Root Valley. They were small settings. By a setting I mean a small quantity of timber—per-

(Testimony of A. B. Hammond.)

haps a million or a million and a half feet. It is the immediate vicinity around the present locality of one of those portable mills. After these small portable mills came into the ownership of the Blackfoot Milling and Manufacturing Company, it sold the lumber wherever they found a market. Some of it went to the Helena lumber yard. I think my ownership of stock in the Blackfoot Milling and Manufacturing Company was about twenty per cent. I never owned, either directly or indirectly, any other stock at any time in the Blackfoot Milling and Manufacturing Company than such stock as was in my name, which I actually owned. That is represented by this twenty per cent, or thereabouts, to which I have referred. When the Blackfoot Milling and Manufacturing Company was operating these mills in the Bitter Root, the mill property owned by the same corporation in the Blackfoot that was leased to W. H. Hammond, was operated by him and while that mill was so operated by W. H. Hammond, I did not, either directly or indirectly, participate in the [601] profits of its operation, nor did any of the corporations in which I was a stockholder, either directly or indirectly, participate in the profits of that operation. I remember the organizing of the Big Blackfoot Milling Company. It succeeded to the property owned by the Blackfoot Milling and Manufacturing Company. The Blackfoot Mill property was never run by the Blackfoot Milling and Manufacturing Company. After the Big Blackfoot Milling Company was incorporated, it took over



(Testimony of A. B. Hammond.)

the property of the Blackfoot Milling and Manufacturing Company, and they then proceeded to operate on the Blackfoot. I think that was in 1891. During the period of time ending with the year 1895, the greatest extent of my holdings of stock in the Big Blackfoot Milling Company was about the same as the stock that I held in the Blackfoot Milling and Manufacturing Company, that is to say, about twenty per cent. I don't think I increased my holdings of stock in the Big Blackfoot Milling Company beyond that twenty per cent, or thereabouts, during the period of time ending with the year 1895. I may have increased my holdings. Those things happened a long time ago. I have no recollection of increasing my holdings. I did not buy any large block of stock at that time, in those years. Twenty per cent was approximately what I owned, directly or indirectly, during those years. The names of the stockholders, as nearly as I can recollect them, in the Big Blackfoot Milling Company, during the period of its existence and ending with the final disposition of the stock, here testified to, to the Anaconda people, as they are called in this record, in addition to myself, were E. L. Bonner, R. A. Eddy, W. H. Hammond, C. H. McLeod, J. M. Keith, Thomas C. Marshall, T. G. Hathaway, Sr., and T. G. Hathaway, Jr. I do not think there was any great change [602] in the stockholders between 1895 and 1898. G. W. Fenwick, Mrs. Fenwick, and George L. Hammond were also stockholders. I think I have named from memory about all the stockholders there were. I think

(Testimony of A. B. Hammond.)

there was one—a man by the name of Scharnakow, that had some stock. I think that was about all. Directing my attention, as you are, to the list of stockholders in the Missoula Mercantile Company—October 24, 1891 to October 27, 1898, heretofore read in evidence—E. L. Bonner, a stockholder in the Missoula Mercantile Company, was a stockholder in the Big Blackfoot Milling Company; so was R. A. Eddy; E. M. Eddy was not. I have already testified about myself. C. H. McLeod was an owner of stock in the Big Blackfoot Milling Company; so was J. M. Keith and T. G. Hathaway; but H. T. Van Wort; F. T. Stirling; W. A. Mentrurn; T. B. Thompson; H. C. Keith; J. P. Mannard; J. M. Price; T. T. McLeod; C. A. Barnes; D. H. Ross; T. Hosey; W. S. Settle; F. W. Jones; J. F. Dorman; J. B. Jenkins; T. E. Bassler; G. W. Dorrity; C. L. McLeod and W. H. Allison, while stockholders in the Missoula Mercantile Company were not stockholders in the Big Blackfoot Milling Company. G. Moser was secretary of the Big Blackfoot Milling Company, but I don't think he was a stockholder. Scharnakow appears to have had one share of stock in the Missoula Mercantile Company, and he became a stockholder in the Big Blackfoot Milling Company a few months before it sold out. C. S. Bonner, L. J. Bonner and B. A. Bonner, while appearing as stockholders in the Missoula Mercantile Company were not stockholders in the Big Blackfoot Milling Company. I know about the Big Blackfoot Milling Company at one time having owned twenty-two shares of stock in the Missoula

(Testimony of A. B. Hammond)

Mercantile Company. They acquired that stock from W. H. [603] Hammond, and I know how W. H. Hammond acquired that twenty-two shares of stock. The circumstances were as follows: D. H. Ross ran a lumber yard and he got in debt; he bought his lumber from W. H. Hammond and got in debt to him; later on W. H. Hammond bought him out and took some land that Ross had on the Blackfoot and shares of stock in the Missoula Mercantile Company, in payment, and ran the business, though under the name of Ross, until such time as the Big Blackfoot Milling Company commenced to operate actively, and then the Blackfoot Milling Company took over the lumber yard at Missoula and W. H. Hammond turned in the shares of stock that he had got from Ross to the Big Blackfoot Milling Company and they paid for them. I mean that the Big Blackfoot Milling Company bought the lumber yard from W. H. Hammond; it did not have any interest in that property before the time it purchased it from W. H. Hammond. I had no interest in the D. H. Ross & Company lumber yard. W. H. Hammond did not at any time hold any interest in that yard for me, nor did either of the members of the firm of D. H. Ross & Company at any time hold any interest in that for me. I was first upon the Blackfoot River after the purchase of the remnants of the dam by W. H. Hammond, in the spring of 1886. I went up there to see the log drive—about twelve or fifteen miles from Bonner. At the time I went to see that log drive, I had no interest in those logs or the log drive—no pecuniary interest of any sort. The occasion of my

(Testimony of A. B. Hammond.)

going there was through curiosity. I had not seen a log drive since I had driven on the Penobscot, when I was a boy. I wanted to see the operation. George L. Hammond was in charge of that drive at that time. As to where W. H. Hammond was at that time—his headquarters were at Bonner—he may have been with me. I don't really recollect whether he made that trip up there with me or not. George L. Hammond was [604] my brother, and he was foreman of the drive and had charge of it. In addition to his occupation as foreman of the drive, he was a farmer and stock-grower in the Blackfoot country and he also was in charge of the logging operations for W. H. Hammond. He had a farm on Elk Creek and one at Ovando. I never had any interest in the farm of George L. Hammond, or in his business. He was seven years older than I. He came to Montana in 1867, the same year that I came. We came together. On this occasion on the Blackfoot, I did not, nor did I on any other occasion, ever say to my brother, George L. Hammond, that if any more men went down, he would go down, too. I have seen a man named Patrick Joyce. He is a saloon-keeper. I don't know where his saloon is now, but he had one at Cannas Prairie. Ever since I knew him, he was in the saloon business. I never, in the presence of Patrick Joyce, on any occasion on the Blackfoot, or elsewhere, say to my older brother, George Hammond, that the next man that went down, he would go down, too. No such conversation ever took place. I never attended another drive on the Blackfoot. At



(Testimony of A. B. Hammond.)

the time I attended the drive on the Blackfoot, I had no interest of any character in any of the operations that were being extended in the Blackfoot. At that time George L. Hammond was neither directly nor indirectly in my employ in any capacity. The next time I was on the Blackfoot after the log drive of 1886, was on a hunting and fishing expedition in the year 1888, I think. It was the second time I was up there. The only time I was up there until last summer, that is twice in all. I never at any time gave any orders or directions to any of the men with regard to the operation on the Blackfoot to any person. With regard to the work in the Hellgate Canyon, when we cleared the right [605] of way, we cut up lots of stuff that we made into cord-wood. In a general way, I know that during the construction of the Northern Pacific, all of their trains were using cord-wood, which was cut up by our people in clearing the right of way and for a number of years afterwards until 1888. A majority of their trains were using cord-wood for fuel. I have seen men who were not employed by myself cutting cord-wood in the Hellgate Canyon other than in clearing off the right of way in this same district between McCarty's Bridge and Bonita. As to the kind and character of trees that were cut for cord-wood, they cut the trees that were handy to the road first, and the trees that would split easy and as good timber as they could find. Much of the timber so cut for cord-wood was good logging timber. I knew a boy named Felix Cyr. I knew Dumas, his father. I first knew him down East.

(Testimony of A. B. Hammond.)

Q. It appears from the testimony of Felix Cyr, when he was a boy fifteen years old, you saw him at Bonita driving a team and you said to him: "Where is your dad?" and he said "He is over home," and you said "You better go back and tell him to drive his own team, you are too small." Do you remember any such conversation?

A. No, sir, I do not, but it may have occurred; I knew Dumas Cyr and his family and I may have made use of such an expression as a pleasantry. I have no recollection of it.

(Witness Continuing:) I never gave any orders to any persons about any transaction in connection with the logging operations at the Bonita Mill. I did not have anything to do personally with the construction of the Bonita Mill on section 14, on the land [606] here in controversy. Mr. Eddy superintended the construction of that mill upon that ground. At that time Mr. Eddy was acting for the Montana Improvement Company, carrying out his agreement with Fred A. Hammond, as to which agreement I have already testified. While that mill was in process of construction, I was upon that mill site at Bonita once, that I recollect. I was there at the mill site before the mill was moved there. I looked at the site. I was there a short time. I think I was on a work train and I stopped off there for a short time, perhaps half an hour or an hour. At that time I gave no orders or directions to any person with regard to the construction of that mill. As to when I was next on the Hellgate, the property here

(Testimony of A. B. Hammond.)

involved, I may have been at the Bonita Mill after Mr. Fenwick owned it once or twice. But I was never on the timber land. By the timber land, I mean the land that is reported to have been cut over. Before the Montana Improvement Company began the construction of the mill under the contract I have referred to, I had known that there were mines in operation at Wallace and there were mines there in operation at Bearmouth. I knew of men working in the mines in Wallace. It was quite a mining district there over near Wallace. Bearmouth was a large mining section and there were a great many mines at Bearmouth,—rather up Bear Gulch—seven or eight miles up the gulch, they ran quite a distance. I should judge the mines at Bear Gulch would be about ten or twelve miles east of Bonita. I built the railroad through the Hellgate and cleared the right of way and lived in that vicinity since 1872. I had been over the road in that Hellgate Canyon from Bearmouth to Wallace, and in the course of those years, a great many times—on the railroad and the wagon road, before the road was built. While we had the [607] contract for the clearing of the right of way, a part of the time I was on the ground. I was familiar with the Hellgate Canyon and the mines in that vicinity I have testified to. My belief as to the character of the lands along the Hellgate Canyon with reference to their being mineral or non-mineral between the station of Bonita or the Bonita Mill on the west and Tyler Gulch upon the east, was that they were mineral lands.

(Testimony of A. B. Hammond.)

Q. The witness, W. A. Cook, made deposition in which he said:

“I was there at one time when Mr. Hammond had a fuss with George Ritz; he had a contract logging; they almost came to blows in Bonita.

“Q. We will finish that out—when was that, what year was that?

“A. That was before they put the mill there; this man Ritz logged about a year before the mill was moved there and banked them on the river above by the Wills place.”

On cross-examination the same witness said in response to the following question:

“Q. What was this fuss between A. B. Hammond and Ritz?

“A. Ritz, it seems, had taken a contract from Mr. Hammond to cut logs; and he afterwards sold the logs to A. C. Kise & Company, and was going to drive them down some place down Rock Creek, and Hammond wanted the logs and he afterwards got them. Kise didn't use them at all; Hammond got them from Ritz afterwards, and he logged for two or three years after that.”

I will ask you if you knew of a mill run by A. C. Kise & Company at Rock Creek? [608]

A. I knew that there was such a mill there.

(Witness Continuing:) Rock Creek is three miles from Bonita, down stream—towards Wallace. I did not know a contractor who spelled his name R-i-t-z, which is the way it is spelled in the deposition. I knew a man named Rich. I have no recol-



(Testimony of A. B. Hammond.)

lection of having any such controversy as is mentioned in Mr. Cook's testimony with a man named Rich. I never knew of any man by the name of Ritz, I knew a man by the name of Rich and he had an account at the Missoula Mercantile Company's store. He had a tie contract and pile contract from E. L. Bonner & Company and during that time that he had those contracts he was furnished with goods by E. L. Bonner & Company. He had the tie and piling contracts during the construction of the Northern Pacific Railroad. I never at any time had any controversy with him over a contract for the cutting of saw logs. I never had any trouble with a man named Rich with regard to any logs or timber that he had cut or piling that he had cut. I do not remember any question arising upon the subject at all at any time between me and Rich or Ritz in 1884. I do not understand how that could be. There was no mill that those logs could go to. The Wallace Mill was not a mill to which logs could be floated. It was not on the river. It was quite a long distance from the river and logs could not be floated down to the Wallace Mill.

Q. Did you ever have any difficulties at any time with a man named Rich or Ritz concerning the use that he made of logs that he had cut, while he had an account with the Missoula Mercantile Company or piles that he had cut [609] before for Eddy-Hammond & Company?

A. Well, Rich had a contract for piles which he did not furnish. At different times Eddy-Ham-

(Testimony of A. B. Hammond.)

mond & Company made efforts to try and get our money for these piles that he was supposed to deliver and did not deliver. I have no recollection of any controversy with him at the time referred to.

(Witness Continuing:) I did not have any controversy with him at any time about any logs for the Bonita Mill.

Q. You do recollect a controversy with him about some piling, or a matter with regard to collecting from him on a bill that he owed to the Missoula Mercantile Company at a time when he was under contract to furnish piling for E. L. Bonner & Company?

A. It was the bill of Eddy-Hammond & Company. We were in business in 1884 then, not the Missoula Mercantile Company. This, I understand, was supposed to have taken place in 1884. That is the year before the Bonita Mill went in.

(Witness Continuing:) During the course of the construction of the siding for the Bonita Mill, I do not think I was there upon more than the one occasion that I have testified to. I have no recollection of being there but once. I do not know a man named Thomas Van Keuren. I know of his evidence, but I have no recollection of the man.

Q. Thomas Van Keuren testified in substance:

“Hathaway took me to office of company in Missoula and introduced me to A. B. Hammond. He asked me first what I worked at. Told him was ox teamster. A. B. Hammond wanted me to [610] go to work at Wallace. I asked what he was paying. He told me. He gave me a letter to go to work, to take to

(Testimony of A. B. Hammond.)

Mr. Henry Hammond. Henry Hammond, it seems, was the 'push' there. I went up there and Henry Hammond told me they were full handed there. He told me to go to Bonita."

Do you remember ever having sent Van Keuren to Henry Hammond at Wallace?

A. I don't know. I may have sent him. I sent Henry Hammond while he was at Wallace logging a good many men. Whenever he wanted men he would telephone down and either I attended to it or somebody else.

(Witness Continuing:) Concerning what has been said in this case about the employment of men and the sending of men to different places for employment, a good many of the mills were situated at places where there were no postoffices and at some of them there were no stations. When they wanted men they would send down to Missoula, send word, and we would send them up. That applied to farmers, and stockmen, as well as lumbermen. A farmer came in from the country who had a ranch fifteen or twenty miles away, and he wanted a teamster, or a man who could run a threshing machine or a mowing-machine, or a self-binder, or a man who could milk cows, and he was very apt to leave word with us if such a man came to Missoula that wanted such a job to send him up to him. The Eddy-Hammond & Company and the Missoula Mercantile Company did a lot of that business. That applies also to graders and it applied to my work in the building of the Bitter Root road—my sub-contractors as well,

(Testimony of A. B. Hammond.)

and I furnished them with men and I sent to Utah and brought men out from that country for graders. We had little mills on the Bitter Root road and we [611] had to have lumbermen to run them and we combined with other people who had mills and sent east and elsewhere to get lumbermen. When those men came to the country they came to Missoula, and if they were connected with the people that we sent to bring them there, why, we found out and we knew where we wanted men and we told them where to go. I remember the occasion of Mr. Hathaway's going East. I think he went East twice. I would not be sure. The circumstances connected with Mr. Hathaway's going East were these: We wanted lumbermen and others wanted lumbermen. I wanted lumbermen in the Bitter Root Valley and W. H. Hammond was short of men and Mr. Fenwick was short of men and Mr. Greenough and I think Haycock, and he was sent to Minneapolis and the expense of sending him there was borne *pro rata* by the parties who got the men.

Q. The same witness, Van Keuren, testified to the effect:

"I got two horses through Mr. Hammond in Missoula, bought one direct from A. B. Hammond and Mr. Hammond got me the other one."

"Q. I think that you testified that you bought one or two horses from Mr. A. B. Hammond, did you not?"

"A. Yes, I did.

Q. Was it one or two?"



(Testimony of A. B. Hammond.)

“A. Two horses.

“Q. Now, how did you pay for those horses?

“A. With those logs that I cut for them at \$4.00 a thousand.

“Q. In other words, in your account with the Missoula Mercantile Company you were charged with the price of those two horses, isn't that the idea? [612]

“A. I was charged with the price of those two horses.

“Q. And when you came to settle up with the Missoula Mercantile Company you were paid just that much less; that is to say, the price of those two horses from what was coming to you?

“A. Yes, and less the supplies that I had.”

Do you remember the specific occurrence with Van Keuren?

A. No, I do not. I did not go into the details of the business to that extent at that time, but the Missoula Mercantile Company dealt in horses, bought and sold horses. It may have sold them to Van Keuren, as it did to anyone else.

(Witness Continuing:) If Van Keuren had something coming to him on account of his contract for furnishing logs to Mr. Fenwick or to Mr. Fred Hammond and Van Keuren had purchased supplies from the Missoula Mercantile Company, the course of dealings under conditions of that kind at the Missoula Mercantile Company's establishment, would be, I suppose, that Van Keuren would be charged up with whatever he got, and when he got paid by Mr. Fen-

(Testimony of A. B. Hammond.)

wick for his logs, Fenwick would probably give him an order on us and when he came down to get his money, the Missoula Mercantile Company would deduct the amount of his bill and pay him the money, the balance, if he had any; and if the Missoula Mercantile Company had sold him some horses, they would deduct the amount of the horses, the same as they would for merchandise or anything else. Neither the Missoula Mercantile Company, nor myself individually, nor the Montana Improvement Company ever purchased any logs from the said Van Keuren. I have seen a man named John Cunningham. [613]

Q. John Cunningham in his deposition testified as follows:

“We told him that Hathaway sent us out, and asked him which way we would go, so he told us to go up the Blackfoot River, and he said he wanted to send a team up, so we took the horses along.

“Q. That was all he said?

“A. Yes, sir.

“Q. When you got up there, who put you to work?

“A. George Hammond.

“Q. Did he tell you what your wages were going to be?

“A. He never set no wages; Hathaway set our wages, \$35.00 a month.

“Q. Mr. A. B. Hammond did not make any arrangement with you about that?

“A. No, sir, never mentioned wages.

“Q. He never mentioned employment at all, ex-

(Testimony of A. B. Hammond.)

cept he told you how to go up the Blackfoot River?

“A. Yes, sir.”

Do you remember ever having any such conversation as that with John Cunningham?

A. No, I don't remember any such conversation.

(Witness Continuing:) Such a conversation may have taken place. If he came in and said he was a woodsman, we would know where such men were most in demand. I have no recollection of having any occasion to send teams up the Blackfoot River at any time. Teams were sent up from Wallace generally. In those days there was no wagon road up the Blackfoot. They went around by Wallace. There was a trail up the Blackfoot. I knew William [614] Harley.

Q. He testified: “A. B. Hammond recommended me as a logger to Fenwick. Met A. B. Hammond on the street; said that Fenwick wanted a logger. Said, ‘I have recommended you as a logger.’ That is as near as I can remember the words, twenty-six years ago. After that conversation with A. B. Hammond went to work for Fenwick.”

Do you remember anything about any occurrence of that kind?

A. I don't remember, but it is quite likely that I would recommend him if he was a logger.

(Witness Continuing:) I do not know that I did. I never employed him for Fenwick. I never made any engagement to employ him for Fenwick. I knew him as a boy. I also knew him as a man because he worked for me in the construction of the

(Testimony of A. B. Hammond.)

Northern Pacific Railroad. I recommended him, I suppose. I would have recommended him if he had asked me to.

Q. Mr. Milton Hammond testified as follows: "A. B. Hammond sent me up in the Blackfoot from Missoula in, I think, September, 1887. He gave me a letter to George Hammond. George Hammond was up there; supposed to be walking boss. Went to work as a scaler. Nothing was said when I was employed as to who would pay me. A. B. Hammond gave me the letter to George Hammond, said I was a scaler. I wrote A. B. Hammond from Stillwater, Minnesota, about the business, and he wrote me to come out. Said he would give as good a job as I was capable of filling. When I came out, talked to him some, and he sent me to George, as I said before. In a letter to me at Stillwater, A. B. Hammond told me to hire forty men and come out with them. [615] I picked up a few men there and sent them out here, and finally came myself. Of course, I had correspondence with him. I looked him up. He wanted lumbermen."

Do you remember any such correspondence as that with Milton Hammond on the subject of bringing men out?

A. No, sir. In those days we were doing what we could to get men to come into the country, both lumbermen and graders and millmen and laborers of all kinds.

(Witness Continuing:) It may have been that such a letter was written by me. At that time we had in



(Testimony of A. B. Hammond.)

Missoula one hundred and fifty men in our mercantile house and later on I had men in the bank, the First National Bank, that I was connected with. I had quite a large operation up there in the Bitter Root, the building of fifty miles of railroad. That is quite a large operation. If Milton Hammond had been a railroad man, I would have taken him up there myself where I was operating. With regard to sending him over to the Blackfoot, assuming that I did, I had no authority whatever to hire men and fix their terms of employment at any time. I never made any contract with any men whereby I employed them for a designated task and fixed their rate of wages either on the Blackfoot or the Hellgate.

Q. He testifies, without saying just when it occurred: "I remember one conversation with A. B. Hammond about the scale up there. He asked how the scale compared with the railroad scale. Told him I did not know; that the orders were not to let each other know; he told me he thought it would be a good thing to understand each other. Never at any time received any directions from A. B. Hammond about my work. Never saw A. B. Hammond on the Blackfoot at all. Saw him at the [616] Bonner Mill. He was just there on a kind of picnic or excursion. Never had any conversation in Missoula Mercantile Company's store about cutting of lumber."

Do you remember any conversation with him about the scaling operations?

(Testimony of A. B. Hammond.)

A. No, sir.

Q. You remember no such conversation?

A. No, sir.

Q. Mr. W. H. Longley testifies: "I think it was in 1887, 1888 and 1889 I worked for A. B. Hammond at the Blackfoot Mill at Bonner. I was running a planer there."

On his cross-examination he said: "Henry Hammond employed me to work at Bonner. I supposed when I said on direct examination that I worked there for A. B. Hammond, that that was the same thing. W. H. Hammond employed me. I simply supposed A. B. Hammond was interested in that."

As a matter of fact, were you interested at any time in a planing mill upon the Blackfoot?

A. No, sir. I was interested in a planing mill on the Blackfoot after it was taken over by these companies.

(Witness Continuing:) I was never individually interested otherwise than as a stockholder in those companies—as a stockholder in the Big Blackfoot Milling Company and the Blackfoot Milling and Manufacturing Company. I did not know of my own knowledge at any time as to the precise sections or quarter sections or subdivisions of land upon which the Big Blackfoot Milling Company was doing these logging operations. For instance, as to section 18, township 14 north, range 15 west, and the so-called Boyd trespass on section 22-14-14, and the Edgar claim [617] in section 28, township 14 north, range 14 west. I did not know that they were

(Testimony of A. B. Hammond.)

cutting on any of those pieces of land at any time or that Henry Hammond was cutting on the Edgar place. I never was on any of those lands that I know of. I knew nothing about the cutting upon them. I do not know of any particular instance of horses being sent from the Blackfoot country by Henry Hammond or by anybody else for sale at Missoula. I remember, in a general way, that horses were sent down from the Blackfoot country by Henry Hammond for sale.

Q. R. K. McLaughlin testified: "George Hammond ordered me to take horses down to Missoula. Horses belonged to Blackfoot Milling Company, to the best of my knowledge. That is my opinion, not my knowledge. In my opinion, A. B. Hammond owned a stable in Missoula. George Hammond told me to put the horses in that barn. Can't repeat what conversation I had with A. B. Hammond about them."

Do you remember anything of that particular incident?

A. No, sir. I had no barns.

(Witness Continuing:) As to the barns there were in Missoula—there was a barn there that belonged to Eddy-Hammond & Company and afterwards to the Missoula Mercantile Company and was used by the Missoula Mercantile Company for keeping its delivery horses. It was a large barn and a corral. We kept our freighting outfit there, when we used to freight from the Central Pacific Railroad into Missoula by wagon. I do not remember any horses

(Testimony of A. B. Hammond.)

belonging to the Blackfoot Milling Company ever being brought there for sale—but no doubt there were horses sent there for sale by Henry Hammond. He sent some horses down and asked us to sell those horses. [618] It may have been that Henry Hammond closed out his logging outfit and that horses were sent over during the time that he was closing that out. There were details of the business that I did not take the responsibility of. We had a man, a horseman, to look after the horses, and I did not pay very much attention to the supervision of that business. I heard the testimony of McLaughlin, that he was stopping at one hotel and that I told him to go to the Florence Hotel. The Rankin House was the first hotel that he mentioned. The Rankin House was right directly opposite the Missoula Mercantile Company, right across the street. The Florence Hotel was across the street on Higgins Avenue. There wasn't very much difference between the proximity of either hotel to the Missoula Mercantile Company's store. The Rankin House was right in front of the building, across the street, and the other hotel was on the other street. The Rankin Hotel was a dollar a day house, where the lumbermen generally put up, and the Florence was in those days a three to five dollar a day house, where the fancy drummers stayed. I do not recollect ever telling any man who brought some horses from the Blackfoot to leave the Rankin House and go over to the Florence Hotel and stay there. In 1885 I was connected with the ownership of quite a large amount



(Testimony of A. B. Hammond.)

of land around the Helena Depot and in that section where the Helena Lumber Yard was situated. I platted it out into town lots and we had constructed quite a number of buildings. I got the lumber for the buildings from the Helena Lumber Company; in fact, they took the contract and put up some small buildings. Now, I used to go to Helena on other business and business connected with the railroad operations that I was carrying on. I would always go down and look over the property that I was interested [619] in in that section and go into the Helena Lumber Company's office and visit with them. I have testified that the Montana Improvement Company at one time owned the Helena lumber yard and sold it to Mr. Coombs and that he then ran that lumber yard. The sale made by the Montana Improvement Company was largely upon credit. I believe the Helena Lumber Company assumed the indebtedness of Coombs to the Montana Improvement Company. I might have made, as Mr. McCulloch testified, an inquiry to the effect that I asked him at one time concerning whether or not the stockholders who had subscribed for stock in the Helena Lumber Company had paid in their subscriptions. I have no recollection of having made that inquiry, but the Montana Improvement Company was in liquidation at that time and dependent upon the sale of the properties that it had made for part cash and part credit to pay their obligations—their own debts. To that extent I suppose I was interested in knowing how they were getting on with

(Testimony of A. B. Hammond.)

their business. I may have made such an inquiry, but I don't recollect of having made it. I did not, as a matter of fact, have any interest of any kind or character in that Helena Lumber Yard. The Helena Lumber Company purchased lumber from W. H. Hammond, at Bonner. They were carried by him to quiet a large amount, so much so that when the Big Blackfoot Milling Company took over the business of W. H. Hammond, they bought an interest in the Helena Lumber Company with another lumber company—the A. M. Holter Lumber Company, and it was changed to the Capitol Lumber Company. I know that the indebtedness of the Helena Lumber Company was considerable. I did not have directly to do with the collecting of the assets of the Montana Improvement Company. I was in the Company's employ. [620] I was interested in the collection of its assets and I was interested in seeing these accounts paid, but I had nothing to do with the collection of these assets. With reference to cutting upon the Hellgate by Fred A. Hammond or by Mr. Fenwick during the time their mills were in operation, I had no knowledge as to the place or places from which they or either of them at any time procured any logs for their mills. I did not know where they were cutting their logs. I have heard some testimony read here with regard to taxes that appear to have been assessed to the Missoula Mercantile Company.

Q. I call your attention to Plaintiff's Exhibit No. 10. There are certain items there which appear

(Testimony of A. B. Hammond.)

to have been assessed to the Missoula Mercantile Company, one being the Fowler Mill, the Tyler Mill, the Williams Mill and the Silver Thorn Mill. Do you know anything about any of those mills?

A. The Tyler Mill and the Fowler Mill and the Silver Thorn Mill, I do, they were little mills that were put in the Bitter Root Valley and were owned by the parties who built the Bitter Root Railroad, and those mills were afterwards sold to the Blackfoot Milling & Manufacturing Company.

(Witness Continuing:) I never authorized or directed, nor was I ever present at any meeting of the Board of Directors at which it was authorized or directed, that the Missoula Mercantile Company should return to the assessor any property. I never authorized any person to make return of the Blackfoot Milling & Manufacturing Company's property or the Big Blackfoot Milling Company property to the assessor, either in the name of the Missoula Mercantile Company or under any other name. I know a piece of property called the Eddy residence in Missoula. It belonged to R. A. [621] Eddy.

Q. I notice upon this list that that is assessed to the Missoula Mercantile Company. Did the Missoula Mercantile Company have any interest in that piece of property? A. No, sir.

Q. Another, E. L. Bonner residence. Did E. L. Bonner have a residence in Missoula?

A. Yes, and a fine one.

(Witness Continuing:) That did not belong to the Missoula Mercantile Company. I know a block,

(Testimony of A. B. Hammond.)

called the Jordan Block, that belonged to the Missoula Mercantile Company. I know a block called the Hammond Block, that belonged to the Missoula Real Estate Association. The Missoula Mercantile Company did not have any interest in the Hammond Block whatsoever.

Q. I call your attention to the assessment of the Florence Hotel and Eddy Block to the Missoula Mercantile Company.

A. Those two buildings belonged to the Missoula Real Estate Association.

(Witness Continuing:) The Missoula Mercantile Company did not have any interest whatsoever in the Missoula Real Estate Association. I have no personal knowledge of how it was that these different properties not belonging to the Missoula Mercantile Company happened to be assessed to the Missoula Mercantile Company.

Tuesday, February 4th, 1913.

Cross-examination.

I was not connected with both firms known as E. L. Bonner & Company. I was connected with E. L. Bonner & Company that took the contract to furnish the Northern Pacific [622] timber, ties and piling and clear the right of way for about two hundred and eighty miles. That firm had its headquarters part of the time at Missoula and a part of the time at Deer Lodge. E. L. Bonner, of Deer Lodge, looked after the business at Deer Lodge to a very great extent. These two firms were not inter-



(Testimony of A. B. Hammond.)

locked copartnerships. The firm of E. L. Bonner & Company that took that contract was composed of E. L. Bonner, J. H. Robertson, R. A. Eddy and myself. The original Missoula E. L. Bonner & Company was composed of E. L. Bonner and R. A. Eddy, the firm that Eddy-Hammond & Company succeeded. The firm of what we will call the Missoula E. L. Bonner & Company was a partnership composed of the gentlemen I have stated, and it was what eventually became Eddy-Hammond & Company. E. L. Bonner & Company at Deer Lodge, which had the contract with the Northern Pacific, was composed of E. L. Bonner and J. H. Robertson, and the copartnership continued for a good many years after the Northern Pacific was built. It did not have [623] any connection at all in the business or in any other way with E. L. Bonner & Company that I was connected with. It was a distinct copartnership. That copartnership carried on a mercantile business in Deer Lodge. It had no contracts at all for the clearing of the right of way. I was one of the original members of the co-partnership of E. L. Bonner and Company that had the contract for the clearing of the right of way. M. J. Connell, was connected with E. L. Bonner of Butte. I had a one-fourth interest in E. L. Bonner & Company. We were equal partners.

Q. What amount of money did you put into that firm? A. We put in largely our credit.

(Witness Continuing :) It would be difficult for me to tell about what I was worth at that time—to think

(Testimony of A. B. Hammond.)

back thirty-one years and say just what I was worth. I probably was worth \$40,000, approximately. This firm of E. L. Bonner & Company continued in existence for several years. As to the persons in active charge of the work of clearing the right of way for the Northern Pacific under the contract that E. L. Bonner & Company had—the work was divided. Mr. Eddy had charge of everything west of Missoula and when the active work was commenced, made his headquarters at a place called Weeksville, about one hundred miles west of Missoula. The work east of Missoula was looked after to quite a large extent by Mr. Bonner and myself. We let contracts for clearing the right of way. We let no contracts without consultation with each other. In regard to these contracts, I participated both before the letting of them and in their supervision to see that they were fulfilled, as [624] any other partner would. I had to see as to the conduct of the affairs of that company. It was probably equal to that of the other members. When the firm of Eddy-Hammond & Company was first organized, it took over the business of E. L. Bonner & Company of Missoula, which was a copartnership composed of Mr. Bonner and Mr. Eddy, his cousin. I bought a third interest in that firm. For that third interest I paid \$4,000.00 in cash and the balance of what I lacked, I think some three or four thousand dollars, I had credit for—I bought on credit and afterwards paid it up. I was a partner in the conduct of the business of Eddy-Hammond & Company and performed the duties of

(Testimony of A. B. Hammond.)

a partner. In the first years of Eddy-Hammond & Company up until 1882 or 1883, I spent practically all of my time with the business of that firm. Mr. Eddy lived in Missoula. He was active in the business. In 1881 until 1883, Mr. Eddy gave almost all of his time to the Northern Pacific contract, west of Missoula. Mr. Bonner was in Missoula a good part of the time during that period. During 1881 and 1882 and a part of 1883, I was in Missoula a greater portion of the time than Mr. Eddy. We were all in Missoula after 1883. As to the person in charge of the business from 1883 until the incorporation of the Missoula Mercantile Company—our business was pretty well systematized and we had men that attended at that time to the mercantile business very largely. We had outside enterprises that took a great deal of our time, and our staff or organization looked after the details of the mercantile business to a very large extent. During all of this time it is a fact that I did my share towards shaping the policy and affairs of the Eddy-Hammond & Company. The Missoula Mercantile Company was incorporated in August, 1885, and it merely took over, as has been read from the minutes, the business of Eddy-Hammond & [625] Company. Mr. Bonner, Mr. Eddy and myself were about equal owners in that corporation when it was first incorporated. It was largely a sort of incorporation of the old business of Eddy-Hammond & Company—some of the employees were taken in. I was elected temporary president and was president for three months. For awhile

(Testimony of A. B. Hammond.)

after it was organized it was run by the trustees or a committee. Then Mr. Bonner was elected president. I think he continued president until 1889 and I was then again elected president. From then on I continued as president of the company until after this cutting that is complained of passed by. It is a fact that during most of the time when Mr. Bonner was president of the Missoula Mercantile Company I was the vice-president. I was also a member of the board of trustees. I was also a member of the executive committee appointed by the president or vice-president to look after the business of the Missoula Mercantile Company. When Mr. Bonner, who was president of the Missoula Mercantile Company was absent from the territory, and it was necessary to act, I, as vice-president, acted. There were very few meetings of the trustees of the corporation. If we had a meeting of the trustees and Mr. Bonner was not present, while I was vice-president, I presided. You have a copy of the minutes of those meetings and I do not recollect how many of those meetings there were during that time that Mr. Bonner was president and he was absent and at which I presided as vice-president. I cannot tell you how many meetings of that kind I presided over. I do not know it to be a fact that all the time that Mr. Bonner was president of that corporation, there were but two meetings at which he presided over, at a meeting of the stockholders or at a meeting of the trustees as president of it. I don't know how many meetings we had. [626] I know that there were



(Testimony of A. B. Hammond.)

not very many meetings. We seldom had any meeting of the trustees. There was a meeting of the stockholders every year—probably a meeting of the trustees every year. I think it is a fact that the records of this corporation show that I presided over the meetings of the stockholders and that I did present to the meetings of the stockholders a balance sheet showing the condition of the business, the profits and the losses, resources and the general condition of the corporation each year. When the president was not present, I no doubt acted in his stead, if I was present. I don't pretend to recollect back twenty-five years about every directors' meeting that we held and who were present. The meetings were largely perfunctory. We had then an executive committee and we did not hold regular directors meetings unless it was for some certain purpose that the By-Laws provided for. We complied with the By-Laws as to our meetings. They were held annually. I think I was a member of the executive committee of that corporation during all the time from the incorporation of the Missoula Mercantile Company. I would not say just what the duties were of the executive committee offhand. My duties were to act on subjects when we did not have a directors meeting—when it was not necessary, we did not consider it necessary to take it up before a director's meeting. When I was at Missoula and present, I actively participated during all of those years in those meetings of the executive committee. As to the time I was present and the

(Testimony of A. B. Hammond.)

time I was absent—in 1888 and 1889 I was here in California, part of the time. In the spring of 1890 I moved to Oakland. We lived there until 1892. In 1892 I went to Europe for my health and I was in Europe about seven months. When I say [627] I lived in Oakland, I mean my family was living there. I was in Montana part of the time attending to my business. I was not back in the State of Montana looking after my affairs during the time that my family was living in Oakland in 1889 and 1890. I was in Oakland and in California at different places. We had a house there in Oakland for two years. In the spring of 1890 we took a house on Jackson street, Oakland, for two years and we left there about a month before the time was up. During that time I went to Montana several times. I kept in close touch with all my business affairs. I knew what was going on. I had reports sent to me. I was not in ignorance of the business that was being transacted. I had reports sent to me regularly and I knew what was going on. When I went back I co-operated with the management. But my business about that time had largely drifted out of the mercantile and was in railroad business very largely. I was not buying and selling timber lands in 1890. I had no timber lands in 1890 that I know of. During all of the time that I was down here in California I suppose I was consulted on important questions. During the years 1885, 1886 and 1887 I was quite actively engaged in building railroads in Montana and in fact gave up the most of my time to

(Testimony of A. B. Hammond.)

that business. I had an interest in the Missoula Mercantile Company and I co-operated with the others in attending to the business when I was in Missoula. I spent a third of my time away from Missoula and the balance of the time I was in Missoula I was occupied with outside business. When I was in Missoula my office and place of business was in the Missoula Mercantile Company. The construction of the Bitter Root Railroad I carried on from Missoula. Most of the other parties interested [628] with me were men living in Helena and they had headquarters there. That was the financial end. I made frequent visits to Helena to consult with them. The Bitter Root Railroad was started in 1886. I think we commenced in the very early spring of 1886 surveying and getting rights of way and making locations. I could not tell you when the active work of construction commenced. It was sometime in 1886. There is a great deal of preliminary work to do leading up to the building of a railroad, financing it and matters of that kind. The road to Remini, Laurel, Phillipsburg and Cole Creek, and these other roads, were started in 1886. The road from Logan to Butte was started, I think, in 1887, and the Remini road, I think, sometime earlier. The Remini road was a short road. It was eventually built to Marysville. It is a little side track up the valley back of Helena—we built a road out the same time to Marysville. That road was, I think, about twenty-five miles long. The Blackfoot Milling and Manufacturing Company was incor-

(Testimony of A. B. Hammond.)

porated late in 1888. I became a stockholder in it about the same time it was incorporated. I think I became a director of that corporation. I would not be sure. I think I was a director when the company was incorporated, but I am not sure that I was. Probably if I did become a director at its incorporation, I continued as such during its entire life. I am not sure, I think I was a director. Held no office in the company outside of director. About the time of the incorporation of the Big Blackfoot Milling Company I became a director in the Big Blackfoot Milling Company and I continued to be a director of that company until I finally sold my stock to Mr. Daly. I do not think I was appointed trustee by the other stockholders [629] and all of the stock was placed in my name to consummate the sale to Mr. Daly. I participated in that sale as a stockholder. The stock was sold to Mr. Daly and was deposited by the stockholders—at least that is my recollection of the transaction—in the First National Bank. I don't think all that stock was transferred to me as trustee or that the greater part of it was. I don't remember positively. I have told you what I do remember about it. I remember that it was not transferred to me. I deposited my stock, like any other stockholder, in escrow, and the trade was made and Mr. Daly paid for the stock and took it over. The purchase price of that stock was not paid over to me. The sale to Mr. Daly included some timber land that I owned on Nine Mile Prairie, about thirty miles west of the Big Blackfoot River. Mr. Daly



(Testimony of A. B. Hammond.)

had a sawmill—I say Daly, I think it was the Anaconda Company, but he had a mill down there and he didn't want to buy the Big Blackfoot Milling Company unless he could get these lands that I had near to the mill that he owned. It was because of that largely that I was drawn into the negotiations in the manner that I was. Of course, I would have been drawn into them anyway as a stockholder. That deal would not have been consummated without my consent. We could not have sold without the consent of all the stockholders. At that time my proportionate ownership of the stock was, I think, the same as it had been before, that is to say, about twenty per cent. I don't remember how much in actual cash I received out of the sale of the Big Blackfoot Milling Company stock to Mr. Daly, but I received several hundred thousand dollars for my holdings on Nine Mile Prairie. I would say I had something like thirty-five hundred or four thousand acres of [630] land. I think the Montana Improvement Company was incorporated in 1882 and I think I was one of the original incorporators of that company. I was treasurer and manager of that company. I was manager of that company until, I think, about 1885. As to the person who succeeded me as the manager of that company—at that time the Montana Improvement Company decided to go out of business and it did go out of business and proceeded to liquidate its affairs. It took several years to collect in the indebtedness. It is probable that the Montana Improvement Company filed an annual statement

(Testimony of A. B. Hammond.)

under the state law of Montana, clear on up until 1897. The statement will show just what they did. I would not pretend to say off-hand what those statements were, that were filed twenty years ago. I did not keep any track of them, I do not now hold my interest in that company. I sold out the interest I had, I think, in the 90's. I did not have anything to sell anyway. I would not be sure that as long as there was any property or any assets or value in the Montana Improvement Company, I continued as a stockholder. There was some small value to the stock. I know of stock being sold in Missoula at sheriff's sale—two hundred and fifty thousand dollars worth of stock and it brought in, I think, two hundred dollars, or something like that. The Northern Pacific Company always owned this fifty-one per cent of the stock of the Montana Improvement Company. They had a contract for it. I think I ceased to be a director of the Montana Improvement Company after it decided to wind up its business and liquidate. It was in 1885. After that the Montana Improvement Company had no business. It decided to wind up its affairs and go out of business. Mr. Hathaway continued as an employee of the company and had as much to do with the [631] winding up of the company as anybody—probably more. I don't think the company ran the Wallace Mill until along in 1886. It went up there and sawed some logs that were hauled to the Wallace Mill in 1885. It sawed up those logs and the lumber that was there was disposed of during the liquidation of the business. Mr.

(Testimony of A. B. Hammond.)

Fenwick and Mr. Henry Hammond were not down there at Wallace in the employment of the Montana Improvement Company along in 1886. That plant was dormant in 1886 and what was done at Wallace was in line with the liquidation of the affairs of the corporation, the winding up of its business and disposing of its properties; they had their homes there and they remained in charge of the property, disposing of it. They were perhaps in the employ of the Montana Improvement Company part of the time and part of the time they were not. I knew at the time of Mr. Fenwick's negotiations for the purchase of the Bonita Mill that he was negotiating for it. As to how I learned that—well, I was not such a business man but what I would know about a proposition of that kind that was going on in or about Missoula, especially when they were family relatives. I knew what they were doing. I could not tell you just now who told me of these negotiations between Fred A. Hammond and George W. Fenwick. Perhaps Mr. Fenwick might have told me about it. They may have mentioned it. I could not say that I knew before that time that Fred A. Hammond was rather dissatisfied with the business down there at Bonita and wanted to get out. Evidently he wanted to sell or he would not have sold. He did not consult with me at all about selling. I don't think Mr. Fenwick consulted with me about the purchase; he may have told me that he was negotiating with Fred, but I don't know that he did. I would not be positive [632] whether Mr. Fenwick or Fred Hammond,

(Testimony of A. B. Hammond.)

either one, said anything to me about it. I might have learned it from Mr. Hathaway or anyone else that was connected with me or had talked with them. I believe the mill site on Bonner is on this section 22 that we have referred to so often. I do not recollect what the deed did convey from the Montana Improvement Company to W. H. Hammond. I do not think the Montana Improvement Company owned any land. I do not know from whom W. H. Hammond got the land in section 22. I think he acquired an interest in that section 22. I think he homesteaded it or took it up under a pre-emption, or something of that kind, but I don't know. He may have. I don't know anything about it except from hearsay. It was his own business. At the time of the transfer from the Montana Improvement Company to W. H. Hammond, by this conveyance the Northern Pacific Company had a contract for fifty-one per cent of the stock. This agreement was with the Northern Pacific. The Montana Improvement Company was the other party to the agreement. At the time this contract was made by the Montana Improvement Company with the Northern Pacific Company, I could not tell you who the stockholders were in the Montana Improvement Company. I was one of them.

Q. Was this contract ever fulfilled, this contract for fifty-one per cent of the stock? Was the stock ever transferred to the Northern Pacific Company?

A. I don't think it was transferred. I would not be sure about that, but we had a contract to give them the stock.



(Testimony of A. B. Hammond.)

(Witness Continuing:) As to whether that was just simply a gift to the [633] Northern Pacific—the contract speaks for itself. I don't remember the details of the contract. Those transactions took place some twenty-five or thirty years ago. There was a contract with the Northern Pacific Railroad Company whereby it was to have fifty-one per cent, and it was because of that contract that the Government objected to the Montana Improvement Company operating under the rules of the Secretary of the Interior, and it was because of that contract that we decided finally to go out of business. While we thought that we had, as a local corporation in Montana, the right to operate under the rules of the Secretary of the Interior—by which I mean cutting timber on mineral lands for mining and agricultural purposes in accordance with the act of June 3, 1878. The Montana Improvement contract was no subterfuge to get away from the act of 1875 allowing railroad companies to cut. It was an absolutely *bona fide* transaction. As to what the Northern Pacific gave to the Montana Improvement Company for the fifty-one per cent of the stock, it was to have—the contract provided that the Montana Improvement Company should have the right to cut Northern Pacific timber from McCarty's Bridge in Montana to Pend O'reille Lake in Idaho, the exclusive right, I think, for two hundred (200) miles. We were to pay for the timber as we cut it and it was supposed by the gentlemen who promoted the Montana Improvement Company, of which Mr. Bonner was the

(Testimony of A. B. Hammond.)

head and front, that it was a very valuable contract, but it turned out otherwise, and because of the objections on the part of the Secretary of the Interior, we went out of business. It was not on account of any of the lawsuits that were brought against the Montana Improvement Company, for at that time there were no lawsuits brought against the company. We had heard that the [634] Commissioner of the General Land Office, Mr. Sparks, held that because of this contract with the Northern Pacific, wherein it was to have fifty-one per cent of the stock, that the Montana Improvement Company, a corporation, was not entitled to the privileges under the act of June, 1878, which is an act which gave the right to cut on mineral lands, but the right was not given to railroad corporations, and while we did not agree with the Secretary, and our attorneys—

Mr. HALL.—You considered, did you not, that by giving the Northern Pacific Company fifty-one per cent of the stock, you holding the remaining forty-nine per cent, that the Montana Improvement Company had the right to cut under the act of June 3, 1878? A. Well, we—

Q. Just answer the question, yes or no?

A. We considered it, but we did not—there was a question there, a question of law and because of that question we decided to go out of business and did go out of business.

Q. The attempt was made, wasn't it, to permit the Northern Pacific Company to get the benefits of the act of 1878, by giving it fifty-one per cent of the stock

(Testimony of A. B. Hammond.)

of the Montana Improvement Company? That was the arrangement, wasn't it?

A. Well, the arrangement was to give the Northern Pacific fifty-one per cent of the stock.

Q. Yes, and that the Montana Improvement Company should then go on and claim the benefits of cutting under the act of June 3, 1878?

A. The Montana Improvement Company expected to operate under that act. [635]

The COURT.—When you concluded to go out of business, did the Montana Improvement Company surrender this contract for the right to cut on the Northern Pacific lands for the two hundred mile limit?

A. The Northern Pacific Company—yes, that contract became a dead letter.

Q. Just fell?

A. Just fell. I say the Montana Improvement Company then decided to go out of business. There wasn't enough in it to—

Mr. HALL.—This contract was the life and sinew of the Montana Improvement Company?

A. Well, it speaks for itself.

(Witness Continuing:) It was one of the objects of the organizing of the company, and I suppose the railroad company—I know we thought we were within our rights at that time when we decided to go out of business, and our attorneys thought that we were within our rights. The attorneys that I speak of were Warren Toole and T. C. Marshall. We discussed it also with the attorneys of the Northern Pa-

(Testimony of A. B. Hammond.)

cific. They were at a meeting in Deer Lodge. Senator Saunders was there. Thomas C. Marshall acted as attorney for myself and some of these corporations that I was interested in for a good many years. The firm was Woody & Marshall—afterwards it was Marshall. We had other attorneys. Saunders and Cullen at Helena were attorneys of ours and Warren Toole. [636]

Thomas C. Marshall did not come to the State of Montana until 1880 or 1881. Frank H. Woody was the name of Mr. Marshall's partner. I was in Montana in 1878. I knew men by the name of James House, Matt Coleman and John Fredline. House was a miner at Wallace; I think Coleman was a rancher and Fredline was a carpenter. Mr. Woody had a son; I think his name was Frank H. Woody, Jr. I don't think he was born in 1870. He must have been a very young boy in 1870, if he was born. I remember hearing, as I would have heard any other report, that was generally public, of the organization of the Wallace Mining District at the time it was organized. As to the boundaries of the Wallace Mining District, I heard W. J. McCormick, who was instrumental in effecting the organization, speaking of the Wallace Mining District and its boundaries. McCormick was an attorney at Missoula. I used to know where Medicine Tree Hill is. I had it pointed out to me, but it is long ago. I know where McCarty's bridge is. It is about five or six miles east of Bonita. I knew where the Tyler Ranch was; that was at McCarty's bridge. If you say that Tyler's



(Testimony of A. B. Hammond.)

ranch is in section 23, township 11 north, range 15 west, I will take your word for it. I never knew what section it was in. I testified that the principal amount of timber in that section is from McCarty's bridge to Bonner. The Wallace Mills cut timber directly around them. They did not float any logs from up the river. The best tract of timber was at Wallace. There was considerable of the piling that I have mentioned cut between Bonita and Wallace. There was some of it cut around Bonita, a good deal of it around Bonita and east of Bonita. While the mills were at Wallace, it was not fair to the contractor who took the contract to [637] furnish lumber at that place, to put a mill there and cut the lumber that was to be used for bridge timbers into piling. We aimed to let the piling contracts and the tie contracts where there were no mills. The piling, after it was cut, was hauled to the line of the railroad. The contract provided that the piling and ties should be delivered on the right of way. At that time piling or ties were not hauled for a distance of ten or fifteen or twenty miles from the point where they were cut, unless there was some particular place where they could not wait for the construction trains and they had to have piling or square timbers at once, then we would go out and cut and haul them for these longer distances, but that was an exception to the rule. The contract provided that we had the right to deliver piles, ties and timbers anywhere on the right of way where it was most convenient to get it.

Q. But throughout this two hundred and eighty

(Testimony of A. B. Hammond.)

miles of right of way, there was no place, except in very exceptional instances, where you hauled the piling and ties more than five or six miles that were used in the construction, is that what you mean to say?

A. With the exception—there were piles and ties taken from the Big Blackfoot River and driven down to Bonner.

(Witness Continuing:) A man by the name of Sloan had quite a large contract for delivering ties and piles from the Blackfoot. He went up the river and cut the timber along the river, so he did not have to haul it very far.

Q. But throughout this two hundred and eighty miles of railroad, isn't it a fact, Mr. Hammond, that all along there there was sufficient timber very near and adjacent to the right of way, so that you did not have to transport the ties [638] and bridge timbers any great distance in order to complete the railroad?

A. If you are familiar with that country, you must know that east of McCarty's bridge is pretty near a treeless country for a good many hundred miles near the road; to the west of Missoula on the Flathead Reservation, there was no timber.

(Witness Continuing:) That stretch along the Flathead was furnished with timber from Idaho and Washington. Some timber was taken out of the Hellgate Canyon to build that road along the Flathead Reservation. The timber that went to build the railroad over the divide west of Missoula at Moran's Gulch—the trestle there—was gotten out

(Testimony of A. B. Hammond.)

west of Horse Plains about eighty miles away, and they undertook to supply the timber by means of work trains for the building of that trestle. The superintendent of construction, when he arrived on the ground, objected, and said they would be delayed six months in building that trestle if the lumber had to come from Weeksville, which was some eighty miles away, and he was going to start in hauling it by teams up there at once and would not wait until the road got through, because it would mean a very great delay, which the Northern Pacific Company could not afford to take; so that timber was not used; that is, that timber they had gotten at Weeksville was not used for the purpose it was intended. They had to let another contract; that is, they got the timber out in duplicate. Weeksville was about one hundred and ten miles from Bonita. Bonita was thirty or thirty-five miles from this trestle that had to be built. This timber was not hauled from the [639] vicinity of Bonita over to this cut. The road was built from west to east. I think the road met somewhere at Garrison and the golden spike was driven there in the summer of 1883. The railroad crossed the mountains, the Rocky Mountains, by means of a switch back. The main line was not constructed until some time afterwards. The Muklen Tunnel was not built and the main line road was not constructed, I think, for some eighteen months afterwards. The construction came in east and west, but a great deal of the stuff was taken from the canyon for the construction of the tunnel and the road lead-

(Testimony of A. B. Hammond.)

ing up to the tunnel, that was after the road was joined together, after this temporary road was built over the Rocky Mountains. I don't think the completion of the road in 1883, when it was joined at Cole Creek, was regarded as the real completion. They operated that switch back for some considerable time before the tunnel was completed. This Haycock Mill—there were three Haycock mills established in this Hellgate country. The first one established was, I think, in 1881, between Bonita and McCarty's bridge. It was a small portable mill. They were all small portable mills. When I say a small portable mill, I mean it was a smaller mill than that which was eventually run and operated by Fred Hammond and Fenwick on section 14-11-16. I do not suppose that the Haycock Mill had a capacity of over eight or ten thousand a day. It ran there probably six months. I do not know whether it ran continuously every day. It had a small contract and it took out the timber around it and then moved away. It was not an extensive mill and did not carry on any operations nearly as large as the Bonita Mill did. It was a small mill. [640] It is a fact that the other mills I mentioned in the Blackfoot country or in the Bitter Root country were small portable mills that cut out around the stand. I think one of those mills was called the Haycock mill and there was a mill down west of Missoula at Turah, also called the Haycock Mill.

Q. None of these small mills that we are talking about had anywhere near the capacity of either the Bonner Mill or the Bonita Mill?



(Testimony of A. B. Hammond.)

A. No—the Bonner Mill was a large mill.

(Witness Continuing:) The Bonita Mill was not a large mill. It was a portable mill. It was larger than the Haycock Mills. The Haycock mills had a capacity of probably eight or ten thousand feet, and I suppose the Bonita Mill had a capacity of fifteen thousand feet a day. I never estimated its cut. By a portable mill is intended a mill that can be hauled away with a wagon and which seeks the lumber rather than having the lumber brought to it from a distance. It seeks thickly timbered districts. The Bonner Mill was a large permanent plant. Indirectly I am a stockholder yet in the Missoula Mercantile Company, that is to say, I own stock in a company that owns stock in the Missoula Mercantile Company. I continued personally to own stock directly in the Missoula Mercantile Company until, I think, three or four years ago. The closing out of my affairs in the State of Montana and cessation of my personal supervision of business up there, came about gradually. Since 1888 I have not been actively in any business in Montana. I disposed of my residence in Missoula at that time, and I have not attended to the details of any business since that in that State. I have been a stockholder in the Missoula Mercantile Company ever [641] since it has been organized I have not been a director of the Missoula Mercantile Company for several years. I was a director in the Missoula Mercantile Company up until probably 1895. I would not be sure just now.

Q. How much did you ultimately realize from the

(Testimony of A. B. Hammond.)

sale of your interest in the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company, the Montana Improvement Company and the Missoula Mercantile Company?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

#### **Defendant's Exception No. 16.**

A. Well, so far as the Montana Improvement Company is concerned, I came out at the little end of the horn. I never got anything out of it. I lost what I put in. The Blackfoot Milling and Manufacturing Company was a transfer of stock. I received stock in the Big Blackfoot Milling Company; that was really in effect a transfer of the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, and I received stock in that transfer.

Q. From the Big Blackfoot Milling Company, how much did you ultimately receive out of it?

To which question defendant objected, on the ground that it was irrelevant, incompetent, and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination [642] which

(Testimony of A. B. Hammond.)

amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

**Defendant's Exception No. 17.**

A. I got my *pro rata* out of the sale of the Big Blackfoot Milling Company. I could not say off-hand what it amounted to, but I think it was as much as my brother got.

Q. Now, the Missoula Mercantile Company, how much did you ultimately receive from that?

A. I have never disposed of my interest in the Missoula Mercantile Company directly. I have taken stock in another corporation.

Q. What was the value of your stock when you transferred your interest in the Missoula Mercantile Company?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

**Defendant's Exception No. 18.**

Mr. HALL.—I am trying to find out what he derived from his interest in the Missoula Mercantile Company.

(Testimony of A. B. Hammond.)

A. That is a matter of opinion. My interest did not increase very much. I got 6% dividends on my stock in the Missoula Mercantile Company. I took stock in another corporation. [643]

The COURT.—You did not sell it for cash?

A. No, sir.

Q. What is your estimate of its value at the time of your disposition of it?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounted to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court, to which ruling of the Court defendant then and there duly excepted.

### **Defendant's Exception No. 19.**

A. I do not consider that it depreciated any. It was worth as much as it was originally worth, if not more.

Q. Can't you give it to me in dollars and cents, so we can get it into the record?

To which question defendant objected, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it is an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution; which said objection was overruled by the Court; to which ruling of



(Testimony of A. B. Hammond.)

the Court defendant then and there duly excepted.

**Defendant's Exception No. 20.**

A. I should judge it was worth at least two hundred and fifty or three hundred thousand dollars.

**Redirect Examination.**

Thereupon defendant handed to the witness a certain document thereafter marked Defendant's Exhibit "R," and requested the witness to state whether or not that was the contract [644] between the Montana Improvement Company and the Northern Pacific Railroad Company to which he had referred in his cross-examination; to which question the witness replied that it was the original contract.

Defendant thereupon offered and read in evidence the said document and the same was thereupon marked Defendant's Exhibit "R," which said contract is in the words and figures following, to wit: [645]

**[Defendant's Exhibit "R"—Agreement, Dated July 2, 1883, Northern Pacific R. R. Co.—Montana Improvement Co., Ltd.]**

This agreement made and entered into this second day of July, eighteen hundred and eighty-three, by and between the Northern Pacific Railroad Company, a corporation created and existing by and under Act of the Congress of the United States entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by

the Northern route," approved July 12, 1864, and the Acts and resolutions amendatory thereof and supplementary thereto, party of the first part, and the Montana Improvement Company (Limited), party of the second part,

WITNESSETH, that for and in consideration of the covenants and agreements of the said Improvement Company herein contained, the said Railroad Company hereby grants unto the said Improvement Company the right to enter upon all the timber lands belonging to the said railroad company in the Territories of Montana and Idaho, granted to it by the said act of Congress to aid in the construction of *it* railroad, contained between North & South lines running respectively through a point on said railroad known as "McCarty's Bridge" on the Hellgate River, in Montana Territory, and through Sand Point, in Idaho Territory, and so situated that the timber thereon can be conveniently and economically brought or taken to mills on or near the said railroad, or on the Clark's Fork River or Lake Pend d'Oreille, and any timber lands further east than McCarty's bridge belonging to the said Railroad Company granted as aforesaid, situate on or convenient to streams running into Lake Pend d'Oreille; excepting & reserving such of said lands as are or shall be within the right of way of said railroad or of any branch or other railroad now, or hereafter to be operated by the said railroad company, or that may be occupied or used, or [646] required to be occupied or used, in connection with the operation of any of said railroads, and also excepting and

reserving any parcel or parcels of said lands in the immediate vicinity of any of said Railroads, which at any time the said railroad may desire to have preserved and shall designate, from time to time, to the said improvement company, and to cut and remove from said lands all merchantable timber thereon suitable to be manufactured into timber, but only in the manner, for the purposes and subject to the limitations and conditions herein mentioned and provided.

The right hereby granted to enter upon or to cut or remove any timber from said lands, or any of them, shall not extend beyond the period of twenty years from the day of the date of this agreement.

And the said Railroad Company hereby agrees to transport, at reasonable charges, when and where it can be done without interfering with the other business of the railroad, logs & timber cut on said lands & delivered by the said improvement company on board the cars or flats of the said railroad company to the mills on the line of the said railroad erected, or owned, or operated by the said improvement company; to furnish the necessary sidings for shipping the lumber that shall be manufactured by the said improvement company as it will at the same time, give to any other shipper in like condition as to location & facilities, & sufficiently low to allow the said improvement company a reasonable profit on its business of manufacturing & selling lumber & the other products of said timber; & to furnish suitable facilities; as far as reasonably practicable for loading & unloading on the railroad tracks, the

lumber & other products of said timber manufactured by the said improvement Company at all important Towns & Villages along the line of said railroad [647] in Montana & Idaho, where the said improvement company can establish a profitable trade.

And the said Railroad Company further agrees, that it will not give to any other persons, or body or bodies corporate, any lower rates, or greater facilities, for the transportation of lumber that it gives to the said Improvement Company; that it will forthwith withdraw all its timber lands from sale on or adjacent to its said railroad, & on or adjacent to the rivers, lakes & streams aforesaid, & will not sell any part thereof containing timber suitable for the purposes of this agreement, without the consent of the improvement Company so long as the right hereby granted remains in force & effect except such portions thereof as other persons now have thereto *a* equitable claim & will furnish; that if the said improvement Company with the fuel, cross-ties, piling, bridge-timber & lumber necessary for the use of its railroad, at reasonable & satisfactory prices, & as low as the same can be purchased from any other parties it will purchase & take said fuel, ties & piling, timbers & lumber from the said improvement Company so far as it can be conveniently used on that part of the railroad contiguous to the said timber lands.

The said improvement Company for & in consideration of the premise does hereby covenant and



agree, to & with the said railroad company, that it, the improvement Company, in payment for the said timber to & removed by it from said lands within the said period of 20 years, or during the time this agreement shall remain in force, shall, & will, forthwith, issue to the said railroad company, ten thousand & one full paid shares of the capital stock of the said improvement company, amounting at their par value to one million & one hundred dollars & will make & deliver the certificate, or certificates therefor, in the [648] manner of & to the said railroad company or to such other person or persons as it shall designate & appoint; which said shares shall not be liable to assessment, or further call, nor for any further payments under the provisions of Section 255, of chapter 15, entitled "Corporations," of the Revised Statute of Montana.

That it, the said improvement company, shall, without delay, erect or purchase the necessary mills for the manufacture of lumber dimention stuff, & other timbers, cross-ties, & such materials & products as the market demands, & the said railroad company shall require for its own use; & that it shall and will conduct its business of logging, lumbering, & manufacturing, & selling its product with diligence, economy & dispatch; & shall & will convert the merchantable timber on said lands into such lumber & materials as the said railroad company shall require for use in the operation & maintenance of its said & the residue into such lumber & products or will supply the demands of the market for building, agricultural, mining, or domestic purposes in the said

Territories of Montana & Idaho, & as fast as shall be required to meet such demands that it will not cut or suffer or permit to be cut, upon any of said lands, any timber or undergrowth of any kind less than eight inches in diameter, that it will not cut, or suffer or permit to be cut any of said merchantable timber into full or cross-ties, except as the railroad company shall require the same to be done; but it will convert the tops & limbs of all trees cut, into cross-ties & fuel & shall pile & burn the brush & refuse in such manner as to prevent the spread of fires and to suppress any that may be started, so as to protect the said timber lands, & all lands adjacent thereto from fires, so far as practible, & that none of said timber, or any [649] of the manufactures or products thereof, shall be exported to any point or place outside of the said Territories of Montana & Idaho, or be disposed of, in any manner, except for the uses & purposes hereinbefore mentioned.

And the said improvement company further undertakes & agrees that to the extent of the \$999,900 of capital stock which will remain to it after the issue & delivery to the said railroad company of the stock hereinbefore provided to be so delivered it will supply all the capital that may be required to erect & construct or purchase mills, booms, piers, docks, yards, tugboats & other necessary facilities, from time to time, as the demands may require & to repair the same, & to purchase the necessary articles & materials required for conducting the business of manufacturing, transporting & selling its

products aforesaid & for the purpose of purchasing any Government or other timber lands which shall be deemed to be for the benefit & interest of the said party of the second part.

The said improvement company agrees to erect & construct all necessary saw-mills, planing-mills, lath-mills, shingle-mills, drying-houses, piers, docks, booms & other improvements, & to furnish suitable & sufficient boats for towing, & barges & other craft necessary for the transportation of said lumber & products, & to furnish all the machinery necessary for the manufactured lumber to the extent demanded by the market, to be supplied thereby; & shall on proper notice, furnish said party of the first part with all the fuel, cross-ties, piling & bridge-timber, that it may desire for its road & branches thereof, or feeders thereto, at reasonable rates, & as low as the same can be procured of other parties; but the said railroad company reserves the right to purchase cross-ties, piling, & fuel, or any other material [650] except sawed lumber, from other parties if it shall so desire, & if lower prices are given than the said improvement Company is willing to sell for.

And the said improvement Company agrees that it will not cut more timber or lumber, than the market to be supplied thereby reasonably requires; & in order that the supply of lumber may be husbanded to meet the natural requirements of the business for future years, the said improvement company agrees that at the request of the said railroad company it will, from time to time, reduce the amount of production, if the said railroad company shall, at any

time, consider the market overstocked.

That for the purpose of preventing trespassers upon the public domain of timber over large areas, each party to this agreement will do all things lawful & proper to be done by it, to confine such trespassers as much as possible to supplying the actual wants of settlers along the line of said railroads for building, agricultural, mining or domestic purposes.

And the said improvement Company agrees that it will not furnish cross-ties, other railroad timber or lumber, to any railroad company, except the party of the first part, unless the said party of the first part shall consent thereto.

The said improvement Company, in consideration of the agreement of the said railroad Company to furnish the facilities hereinbefore mentioned, at the important towns & villages along the line of its railroad in the Territories of Montana & Idaho, as hereinbefore specified & of its other agreements herein contained, does hereby covenant and agree to & with the said railroad company that it, the said improvement Company, shall & will pay to the said railroad Company two dollars per thousand feet, board measure, mill scale, upon all the merchantable timber that shall be manufactured by the said improvement Company into [651] lumber, or other saleable products, the accounts of the same shall be rendered & said payments made by the said improvement Company to the said Railroad Company at the expiration of every three months, or oftener, if so required by the said railroad company.

It is furthermore stipulated between the parties



hereto, that if the said railroad company shall deem it advisable & for its best interests so to do, it may erect mills, & cut, manufacture & remove from said lands, or any of them, such lumber, timber, & material as it may need for its own use upon the railroad belonging to the railroad company, or upon any other railroad it may desire to furnish therewith.

It is hereby mutually covenanted and agreed by & between the parties hereto, that this agreement shall remain in force for the period of 20 years; but if the said improvement Company shall at any time fail to keep, perform or fulfill any of its stipulations, covenants or agreements herein contained, or shall without the written consent of the President of the said railroad company first obtained, assign or transfer this agreement, or any interest therein, the subject matter thereof, then in any such case, all rights & privileges hereby granted to it, shall wholly cease & terminate, & further that at the expiration of this agreement whether by lapse of time or *or* upon failure or default of the said improvement company, as aforesaid, the said improvement Company shall have the right, within a reasonable time, not exceeding six months, to remove from said lands any mills, buildings, or other structures, except docks, wharves, or piers, it may have erected thereon under the provisions hereof.

And it is hereby covenanted & agreed by & between the said parties that for speedy settlement of any questions or matters of difference that shall arise touching the true meaning or anything [652] herein contained or the performance or nonper-

formance thereof, on the part of either party & in respect of which the said parties fail to agree, the same shall be submitted to the arbitration & award of three competent & disinterested arbitrators, one of whom shall select the third & the award of the said arbitrators, or any two of them, shall be binding & conclusive upon the parties hereto, in respect of the questions or matters so submitted to arbitration.

In testimony whereof the said parties have caused their respective corporate seals to be hereunto affixed & these presents to be signed by their respective Presidents, the day & year first hereinbefore written.

NORTHERN PACIFIC RAILROAD  
COMPANY,

Signed By H. VILLARD,  
President.

Signed Attest. SAM C. WILKINSON,  
Secretary.

MONTANA IMPROVEMENT COMPANY.

Signed E. L. BONNER,  
President.

Signed Attest. J. A. ROBERTSON,  
Secretary.

(Testimony of A. B. Hammond.)

[Indorsed]: 100,486.

Recd. G. L. O.

Oct. 9, 1885.

Copy of contract between  
N. P. R. R. Co. and the  
Montana Improvement Co.

	Department			
	of the		Received	
	Interior.			
	L. & R. R. Div.		Dec. 14, 1885.	[653]

8444

## Recross-examination.

That is the contract that caused us to go out of business. I think the stock in the Montana Improvement Company was issued to the railroad company under that contract, but it was not delivered. I am not sure about that. I don't think it ever passed into the hands of the railroad company. I was not the secretary or the president. The contract was entered into in 1883—on the date it bears. The contract was arranged at the time of the incorporation of the Montana Improvement Company. The Montana Improvement Company was incorporated but it did not operate and the Northern Pacific people talked about the contract and it was finally gotten up about the time the Montana Improvement Company commenced to operate. It was gotten up in New York. The Northern Pacific people got that up and Mr. Bonner approved it and it was then that

(Testimony of A. B. Hammond.)

the Montana Improvement Company proceeded to look around and get ready to commence business.

The COURT.—That is when you met the objection—

A. Shortly after that, I don't think we were in operation a year before and we heard that the Land Commissioner objected to the operation of the Montana Improvement Company under that contract.

(Witness Continuing:) We did in fact operate under that contract and cut timber in the manner designated by it. After we got to operating, we did so under that contract.

Redirect Examination.

We did not abandon that contract until after this meeting in July, 1885, when we decided to liquidate.  
[654]

[Testimony of W. H. Hammond, for Defendant  
(Recalled—Cross-examination).]

W. H. HAMMOND, a witness called and sworn on behalf of the defendant, was thereupon recalled for further cross-examination:

Mr. HALL.—You testified on your direct examination that Mr. Boyd cut in section 22, township 14 north, range 14 west. In whom was the title to the lands in section 22, particularly known as the Silvey claims, at the time Mr. Boyd cut there?

A. Silvey.

Mr. WHEELER.—That is objected to as irrelevant, incompetent and immaterial and not cross-examination. The Government has dismissed as to the



(Testimony of George W. Fenwick.)

Silvey claims; therefore, it is no longer of any consequence to us.

Mr. HALL.—The proposition that I want to prove is, that Mr. Boyd was the contractor who did the work of cutting these logs for the Big Blackfoot Milling Company and at that time he cut over the line on the east half of the northeast quarter of section 22.

Mr. WHEELER.—We will admit that Mr. Boyd had a contract for the cutting of logs on adjoining land, but that he had no contract to cut logs on the particular eighty where he cut over the line—that he had no contract with the Big Blackfoot Milling Company to cut on other lands than those embraced within the Silvey claims.

Mr. HALL.—That is all.

Mr. WHEELER.—That is all.

**[Testimony of George W. Fenwick, for Defendant  
(Recalled—Cross-examination).]**

GEORGE W. FENWICK, a witness called and sworn on behalf of the defendant, was thereupon recalled for further cross-examination, and testified as follows:

I was born in New Brunswick, Canada. As to when I was naturalized in the United States—I took out my final [655] papers the 15th day of October, 1894, in Missoula County, Montana, before Judge Witter. I took out my first papers in May, 1886. I do not know what date in May, 1886, I took out my first papers. I have my final papers here, otherwise I would not know the date when I took them out. I

(Testimony of George W. Fenwick.)

am positive I took out my first papers in the spring of 1886. It might be April, May or June, of 1886, but I think it was May, 1886. My recollection is it was a little before or about the same time that I went to Bonita.

Thereupon the defendant rested. [656]

**Stipulation [Re Record of General Land Office on Homestead Entry of Henry F. Edgar, etc.].**

Mr. HALL.—We desire to offer in evidence the records of the General Land Office showing why the homestead entry of Henry F. Edgar was cancelled by the Department of the Interior.

Thereupon a discussion ensued between counsel for each side and the Court concerning the admissibility in evidence of said records, it appearing that there was much hearsay and immaterial matter contained therein, and it was finally agreed between the parties that the reason for the cancellation of said homestead entry of Henry F. Edgar by the Department of the Interior might be stated by the Court to the Jury, to be as follows:

The COURT.—(Addressing the Jury.) The entry was cancelled by reason of the conclusion that it was not made in good faith, based upon the report of a Special Agent; such conclusion was reached by the Acting Commissioner of the General Land Office. Such conclusion was reached at a hearing at which Edgar was cited to appear but did not appear.

**[Testimony of George B. Archibald, for Plaintiff (in Rebuttal).]**

GEORGE B. ARCHIBALD, a witness called and sworn on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination.

I am mineral inspector for the General Land Office. I was educated at Butte, Montana, in the State School of Mines. I took a four-year course, and graduated with the degree of Mining Engineering in 1905. Since I graduated I have been mining engineer, working principally as mineral inspector for the Land Office. I have been engaged as such mineral inspector, [657] in the active inspection of mineral lands for the United States Government, since May, 1909. I have had experience as a practical miner to the extent that while I was going to school, I really practiced mining during vacations, and since then continuously, more or less. I made an examination of the lands in townships 11 north, ranges 15 and 16 west, in the State of Montana, for the purpose of determining the mineral character of the lands. In those two townships I made an examination of the following tracts of land: In township 11 north, range 16 west, I examined section 2; the north half of the northwest quarter of section 10; and the northwest quarter of the northeast quarter of section 10; the east half of the southeast quarter of section 12; the southwest quarter of the southeast quarter of section 10; all of section 12; all of section 14. In township 11 north, range 15 west, I

(Testimony of George B. Archibald.)

examined section 6, section 8, section 18, section 20, section 22 and section 26. At the time of my examination I made notes in the field covering my work.

Q. You may state the examination you made of each section separately and what you found upon it and your conclusion as to the mineral or non-mineral character of the ground.

To which question defendant objected on the ground that it was irrelevant, incompetent and immaterial and not rebuttal.

Thereupon the Court overruled the said objection of defendant, to which said ruling defendant excepted.

### **Defendant's Exception No. 21.**

Starting in with section 10, township 11 north, range 16 west, as to the north half of the northwest quarter and the northwest quarter of the northeast quarter, I found that [658] most all of those three forties were sandstone, with a little lime in the extreme northeast quarter, and there was no excavation of any nature there, absolutely nothing to indicate the land having any value for mineral purposes. The formation dipped to the southwest, and as I said, there was no excavation of any kind, nor anything to indicate the mineral character. The sandstone is not mineralized. Then take the south half of the southeast quarter of section 10 and the northeast quarter of the southeast quarter of section 10, the same township and range, I found that the northeast quarter of the southeast quarter was entirely under-



(Testimony of George B. Archibald.)

lain with sandstone, and in the southeast quarter of the southeast quarter, practically the whole forty was covered with diabase. Diabase is an igneous rock, consisting of plagioclase and feldspar. It may contain minerals. That rock in this particular place did not contain minerals. In the other forty, that was underlain mostly with valley alluvium, and the formation in places does not show for that reason.

Q. I wish you would state whether or not you found any minerals or whether the rock is of such a character as usually bears minerals.

Same objection, ruling and exception as Defendant's Exception No. 21.

#### **Defendant's Exception No. 22.**

A. The only possible place in any of this ground that I have described was over in section 10 where I would expect to find any mineral and that would be in the diabase. For that reason we examined that very thoroughly and found several broken, fractured zones. I went so far as to have assays made of that rock and got absolutely nothing from it.

Q. Go on to the next tract. [659]

Same objection, ruling and exception as Defendant's Exception No. 21.

#### **Defendant's Exception No. 23.**

A. Section 2, township 11 north, range 16 west is underlain almost entirely with sandstone, barren of any mineral values, with a little lime, and along the south side the limestone is great and massive and has no value at all. There is no excavation of any kind

(Testimony of George B. Archibald.)

and the formation is not exposed owing to its being covered with surface detritus gravel, and so on. Going to section 14-11-16, the north half of section 14 contains a little granite in the northeast quarter of the northeast quarter and also a little granite in the southeast quarter of the southeast quarter and the rest of the section is alluvium and sandstone. Over in the northeast quarter of the northwest quarter the same diabase is shown as in said section 10 and also extends down here part way over this forty, and was examined very carefully and could not see any indication of any mineralization at all. None of these formations contained any mineral and there was no excavations of any nature to show it up at all. I had to rely mostly on an examination of the exposed formation where it occurred naturally. The south half of section 14-11-16 was all sandstone and not mineral bearing at all. No exposures, no kind of excavation of any kind and only poor exposures of the formations in places; lots of surface wash was on it. Then section 12 in this same township, the north half is all sandstone and a little quadrant formation. By quadrant formation, I mean a separate formation with iron in it, but it looks like it was barren rock. It has a lot of iron in it. The formation is a sedimentary formation. The balance of the section, all in the extreme southwest quarter, there [660] is granite that cuts across the corner and the balance of the section is underlaid by alluvium and you cannot see the formation in places at all. There is a little point of granite also in the southwest quar-

(Testimony of George B. Archibald.)

ter of the southwest quarter that covers several acres, but it does not show any mineral bearing veins or any veins at all, for that matter.

Q. Did you take any samples for assay purposes from that section?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 24.**

A. Yes, in the southwest quarter of the southwest quarter there was a shattered zone of broken material along the railroad track running north and south and in places there was a little iron stain, and thinking that it might possibly contain a little mineral, and in order to be absolutely sure, I took a sample, but did not get any report at all from it. In section 8, 11 north, 15 west, that is practically all sandstone and quadrant formation and a little lime streak; lime cuts through the middle of the section running northwest and southeast. There are no openings of any kind or nature there and we had to rely solely on the natural exposure of the formation in places. I could not find any mineral indications at all there. In section 18-11-15, there is the same alluvium along the river bottom and sandstones on the northwest of the northeast quarter and also in the southwest quarter; there is some granite and dacite shows in this section. Dacite does not contain any mineral. I do not ever expect to find mineral in dacite. There is also a diabase dike across the southwest quarter, but it does not show any mineral at all. Section 6-11-15 it is practically, mostly all, sand-

(Testimony of George B. Archibald.)

stone with [661] some lime in the northwest quarter of the northeast quarter cutting across the northeast quarter, striking lime in the southwest quarter and some quadrant formation in the extreme southwest. There are no workings of any kind on this section. We had to rely entirely on the exposure of the formation in places. We found absolutely no indication of mineral. On section 20-11-15, it is mostly all sandstone and also shows some granite and dacite. Section 22-11-15 on the south half is all sandstone and a diabase dike crosses through the middle of the section easterly and westerly; there is sandstone in the north half and alluvium along the river bottom and a little dacite up in the extreme northeast forty. There is no indication of mineral at all. Section 26-11-15, the main part of the section is sandstone, some gracite detritus in the south half of the section, the extreme south half, coming down from the mountains and in the northeast quarter of the northeast quarter is practically all diabase. That is where we found considerable working—considerable work had been done up there, a number of tunnels run and some showing of copper rocks found there. That was the only place on the whole ground covered where there was any real mineral indication.

(Witness Continuing:) As to the extent of my examination of this section 26-11-15, that I have just testified to, it was such that I was only over it about three-quarters of a day. One of the men had examined it more completely. I did not devote so much time to it. I took samples from there and had



(Testimony of George B. Archibald.)

them assayed. I turned them over to Mr. Goodall, the assayer,—three samples altogether. One sample was taken from the tunnel which strikes northerly and southerly and shows a very poorly defined vein. The vein matter was a kind of altered [662] country rock and the walls were not well defined; it seemed to dip a little bit to the west, and the best looking stringer in there was about a foot wide. I took a sample from this foot of the best looking material. It showed a little quartz, and by the way, that is the only place that I found any quartz on any of the land—that was in this forty. No quartz was on any of the other ground. This is section 26-11-15. It also showed a little iron pyrites and probably a little chalcopyrites. There appeared to be chalcopyrites, although the assay did not bear it out. The general contour of the ground in this northeast quarter of the northeast quarter of section 26 comprised a gulch running down through the middle forty northerly and southerly.

Q. Did you see any indication of timber having been on that particular forty acres of land?

A. Yes, I noticed some timber on the forty.

#### Cross-examination.

The granite and diabase are the only two rocks that I have mentioned that carried gold. I say that I found quartz on section 26-11-15. The lime that I speak of was what is called Madison limestone. That is not the kind of limestone from which cement is manufactured. It is the kind of limestone that

(Testimony of George B. Archibald.)

is found in the vicinity of gold diggings and mines. Being an expert, I can tell the general kinds of rock by looking at them. Of course, there are finer distinctions that I would have to use a microscope on. My education and experience is supposed to make me expert beyond an ordinary miner; and I have known of a good many miners who go around looking for gold in places where I, as a student and an experienced man, would never think of looking for it; but I don't think you would [663] call them good miners. Nevertheless, I would call them prospectors. Take a miner who has had any experience at all, and he knows the country pretty well and just what formations are likely to contain gold, but in a new camp there are lots of prospectors that have not such an experience. My reason in having these assays made was because I wanted to be accurate. I was satisfied in my own mind that the rock did not carry any gold, but I wanted to be positive about it. I simply did that as a precaution. I was perfectly satisfied in my own mind that it did not contain anything. I never knew of places like that that carried gold. I found iron pyrites. It is sulphide of iron, kind of yellowish, and it looks something like gold. Real miners have never mistaken iron pyrites for gold. I suppose it is very rare that iron pyrites will look so much like gold that you cannot tell it. I have known of instances where iron pyrites did carry gold—it is very rare that it does. The iron pyrites in this case was disseminated through the diabase. The iron pyrites was in very fine specks that were

(Testimony of George B. Archibald.)

difficult to see. It is not the ordinary kind of iron pyrites that carries gold at all. I don't know of any case that iron pyrites of this character carries gold. There is a small amount of gold in iron pyrites, but the small amount of iron pyrites that was in this rock would not contain gold of any value at all. These assay samples were taken from the underground workings out of a tunnel. In my experience I have known of quartz to show pay, and then a little farther on, five or ten feet, not to show it. That is not an infrequent occurrence. In fact, it is customary to find gold in chutes. As to this particular country, I did not know a great deal about its history and as to whether or not there have been any mines within a few miles of this particular section 26 that I am talking about. I was up to the quartz [664] mine one summer. I spent a vacation there in 1902. I was never up at Bearmouth. I have been up to Gold Creek. I know the reputation of the Bearmouth mines, which is of their having been great producers. I don't recollect how much was supposed to have been taken out of there. There are no indications of this country having been prospected at all in times gone by. It is my experience that a great many men, in going over country of that kind, pick up the flat or the loose croppings. They usually follow the float up until they find where the ledge is and then they will work it, if the float looks good. A prospector will go along a country and simply do a little picking here and there looking at the float. It does not mean anything to him until he

(Testimony of George B. Archibald.)

finds the ledge and then he may have a good mine. He is always looking for the vein. As a rule, the prospector has to pick off the surface ground a little bit, otherwise, there will be a poor exposure. After twenty-five or thirty years, prospect work that a miner might have done in that way, would not be disclosed by a superficial examination. I think that any prospector would leave some kind of a hole that you could see. As a student and an experienced mining man, I have known of prospectors passing over land that subsequently developed into very valuable mineral land.

#### Redirect Examination.

The Bearmouth mines would probably be four or five miles from section 26-11-15, if not more. I examined the country up there around the Quigley mine and did some surveying. I was there for about two months altogether. The mine was a rank failure. They never had anything there at all. I know there was some little prospects around Quigley. I don't know what is there now. I have not been there since 1902. I imagine [665] the Quigley mine is at least about fifteen miles from Bonita, on section 10-11-16.

**[Testimony of Oscar J. Reynolds, for Plaintiff (in Rebuttal).]**

OSCAR J. REYNOLDS, a witness called, sworn and examined on behalf of the plaintiff in rebuttal, testified as follows:



(Testimony of Oscar J. Reynolds.)

**Direct Examination.**

I reside at Helena, Montana. By occupation I am a mining engineer. I received a scientific education in mining engineering, studying one year at Golden, Colorado, and three years at the University of California, where I pursued a special course in mining engineering. I did not graduate from the University of California. If I had completed the course I would have been Bachelor of Science. I have engaged in mining since I left the University, in the States of Montana, Idaho, Oregon, California and Mexico. I examined the lands in townships 11 north, ranges 15 and 16 west, in the state of Montana, to ascertain the mineral or non-mineral character. I made this examination during the fall of 1911.

Q. Please state as rapidly as you can the examination you made of each particular tract; what you discovered there and what your conclusion is as to the mineral or non-mineral character.

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 25.**

A. Section 10, township 11 north, range 16 west, north half of northwest quarter and northwest quarter of northeast quarter, I found those forties to be underlain by a sedimentary formation. The lower portion was alluvium. On all of section 2 in township 11 north, range 16 west, the greater portion of this was underlain by a sedimentary—it was all sedimentary [666] and a few patches on the lower part was alluvium. In section 10, township 11

(Testimony of Oscar J. Reynolds.)

north, range 16 west, the south half of the southeast quarter and the northeast quarter of the southeast quarter, there was a sedimentary formation, igneous and alluvium. On the southwest quarter of the southwest quarter of section 10, township 11 north, range 16 west, the igneous rock there showed a fractured zone, running northerly and southerly, in which there was some iron stains, but could hardly be considered to be mineral in character.

Q. What was the next section you examined?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 26.**

A. Section 14, township 11 north, range 16 west. This section was underlain by igneous rock and alluvium for the most part.

Q. Did you find any indications of mineral on said section 14?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 27.**

A. No, sir, I did not.

Q. What was the next section you examined?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 28.**

A. Section 12, township 11 north, range 16 west. This was underlain by sedimentary and igneous rock and alluvium along the river.

(Testimony of Oscar J. Reynolds.)

Q. Did you find any indication of mineral on that section?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 29. [667]**

A. On the southwest quarter of the southwest quarter there was a fractured zone there in igneous material that showed iron stains, but I do not believe it would be considered mineral in character. I examined section 8, township 11 north, range 15 west.

Q. Did you find any indication of mineral in that section?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 30.**

A. No, sir, I did not.

Q. Did you examine section 18, township 11 north, range 15 west?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 31.**

A. I did and saw nothing there to indicate that it was mineral in character.

Q. Continue and state what other sections you examined and what was your conclusion as to their mineral or non-mineral character?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 32.**

A. Section 6-11-15, I saw nothing there to indicate

(Testimony of Oscar J. Reynolds.)

that it was mineral in character; the next was section 20-11-15. I saw nothing there to indicate that it was mineral in character. The next is section 26-11-15; on the east half of the northeast quarter there was some workings and some fractured zones and faults and in one tunnel there I saw a vein of crushed country rock, very little quartz, and I saw a few particles of chalcopyrites and some pyrites of iron. [668]

(Witness Continuing:) I took samples of that and had it assayed by Herbert Goodall, at Helena, Montana. The sample I gave to Mr. Goodall was sample No. 3. I also gave sample No. 1 to Mr. Goodall from the northeast quarter of the northeast quarter of section 26-11-15; and sample No. 2 from the northeast quarter of the northeast quarter 11-15, I gave to Mr. Goodall.

Mr. WHEELER.—I will not object upon the ground that it is hearsay, if the witness testifies what those reports were.

Mr. HALL.—What were the reports on those samples?

Same objection, ruling and exception as Defendant's Exception No. 21.

### **Defendant's Exception No. 33.**

A. Samples Nos. 1 and 2 showed no gold, no silver and no copper; sample No. 3 showed a trace of gold, no silver, and a trace of copper.

Q. Were those the samples that were taken out of this tunnel?



(Testimony of Oscar J. Reynolds.)

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 34.**

A. Sample No. 3 came from the tunnel, but samples Nos. 1 and 2 did not. They came from other places.

Q. What places did they come from?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 35.**

A. Sample No. 1 was on the east side of a creek that flows north through the said northeast quarter of the northeast quarter, which was the best looking rock from a fractured zone in the diabase. It showed some oxide of iron was in some silicious material.  
[669]

Q. Where was the other sample taken from?

Same objection, ruling and exception as Defendant's Exception No. 21.

**Defendant's Exception No. 36.**

A. Sample No. 2 was near that, but a little farther up the hill from No. 1.

**Cross-examination.**

This tunnel that I went into was about sixty-five feet long. Somebody apparently had been foolish enough to run in on that vein for sixty-five feet. I did not see any one hundred dollars worth of work that had been done by Mr. Wills on section 8-11-15. I did not see any work. I don't remember finding an open cut with about one hundred dollars worth of

(Testimony of Oscar J. Reynolds.)

work done in it. I don't remember of seeing opposite Bonita, where there had been a lot of placer mining done. I remember the place up the Hellgate River where a man by the name of Steele had spent several thousand dollars in building a flume and the flume seemed to run backwards after the water was put in. I did not take any samples from there. I did not do any panning there.

Redirect Examination.

I think that Steele flume was north of a section of land involved in this suit. My examination was confined to these sections in suit.

Recross-examination.

I examined some of the railroad sections to see whether they were mineralized or not in this immediate neighborhood adjacent to section 26-11-15.

**[Testimony of J. D. Pardee, for Plaintiff (in Rebuttal).]**

J. D. PARDEE, a witness called, sworn and examined on behalf of the plaintiff in rebuttal, testified as follows: [670]

Direct Examination.

I reside at Washington, D. C. I am geologist in the Geological Survey of the United States. I have been such since 1908.

Mr. WHEELER.—We will admit that the gentleman is qualified. Go right ahead.

(Witness Continuing:) I lived in the state of Montana until the time I entered the Government service in 1908. I was familiar with Bear Creek

(Testimony of J. D. Pardee.)

that empties into the Hellgate River. The mouth of Bear Creek is about five miles in a straight line east from section 26, in township 11 north, range 15 west. The mines on Bear Creek are about seven or eight miles in a straight line north of the mouth of the creek. The nearest mine on Bear Creek is about six or seven miles in a straight line from section 26-11-15. I first saw that stretch of country along the Hellgate River in townships 11 north, ranges 15 and 16 west, when I was a boy, as far back as 1886 or 1887. I did not know at that time of any mining operations that were being conducted in either one of those townships, but I have seen some attempts to mine there, namely, a place near Medicine Tree Hill, on the north side of the river. That was where Abernathy mined. There was a flume built there. I was there at the time the flume was being constructed preparatory to crushing the gravel. I went there after they shut down. At the time I visited it I remember we washed a few pans of gravel and we got such a small prospect that I concluded that it was no good. As to other mining operations in those two townships, I then heard of prospectors doing a little prospecting work up and down that general region, but I did not see any of it. This Abernathy work that I speak of was done, I think, about 1894 or 1895. I made [671] a specific examination of the lands embraced in these two townships the latter part of last October. In my examination I covered the area of these sections which have been named here, and the sections in between. In my examina-

(Testimony of J. D. Pardee.)

tion I found some indications of mineral in sections 26 and 23, in township 11 north, range 15 west. Outside of those sections, I did not find any minerals of value or any indications that there were any minerals of value.

### Cross-examination.

I found some places where other men had been working. My recollection is that one or two very fine colors were produced in a pan or two of dirt at this mine that I refer to. It was so small that it seemed insignificant. I saw about three or four pans panned out. That was when the flume was being built, before the water had been turned in.

### Redirect Examination.

The extent of my examination of section 26-11-15 was as follows: I examined the northeast corner pretty carefully where the mineral indications are to be found and I covered the rest of the section. It was the extreme northeast quarter of the northeast quarter that I examined and that is where I found indications of prospecting, and those indications extended over into section 23, to the northwest, and also into section 25. They did not extend over on to any other portion of section 26. The mineral indications were absent going to the southwest, that is, over the rest of the section. [672]



Wednesday, February 5, 1913.

**[Testimony of Dan Graham, for Plaintiff  
(Recalled in Rebuttal).]**

DAN GRAHAM, a witness called and sworn on behalf of the plaintiff, was thereupon recalled by the plaintiff in rebuttal, and testified as follows:

**Direct Examination.**

I made a rescale of the east half of the northeast quarter of section 22, township 14 north, range 14 west. I made that rescale last December. At that time I observed the portion of the tract described that had been cut over. The cutting extended six hundred and sixty (660) feet from the quarter corner on the east line of section 22. I went around that forty-acre tract. The cutting extended from the southwest corner of the southeast quarter of the northeast quarter of said section, clear across that forty, namely, the said southeast quarter of the northeast quarter, and extended in some places on to the other forty, that is, the northeast quarter of the northeast quarter.

**Cross-examination.**

In the north half of this particular tract, that is, the northeast quarter of the northeast quarter of said section, there is very little timber taken off, but in the lower forty, that is, the southeast quarter of the northeast quarter, I estimated that about two-thirds of that forty acres had been cut off. The cutting runs in and out, a little ragged along there. All of the timber to the west and south of the tract had been

(Testimony of Dan Graham.)

cut. Section 26, to the east of section 22, was cut to quite an extent; but it was not cut on section 23.

**Redirect Examination.**

Two-thirds of the south forty was cut off and a very small portion of the north forty. [673]

**Recross-examination.**

Three hundred and twenty (320) feet on the south side of the north forty, probably somewhere about an acre all told, was cut. The two-thirds that I refer to in the south forty was all clean cutting. What was not cut clean was burned. [674]

**[Stipulation Re Title to Land Described in Complaint, etc.].**

It is stipulated and agreed by the parties hereto that there was a patented placer mining claim in section 23, township 11 north, range 15 west, on Tyler Gulch, and that it contains one hundred and fifty-nine (159) acres.

**[Stipulation of Facts.]**

Thereupon the following facts were stipulated and agreed to by and between the parties hereto:

It is hereby stipulated that during all the time mentioned in the complaint on file herein, the title to all of the lands described in the complaint, except such lands as are hereinafter particularly described, was in the United States, and the United States was the owner of the same:

NW.  $\frac{1}{4}$ , sec. 34, Twp. 14 N., R. 14 W. Pre-emption cash entry No. 4489, made by Elijah F. Cun-

ningham Apr. 1st, 1890, patented January 30th, 1892.

Lots 7, 8, 11, and 12, Sec. 18, Twp. 14 N., R. 15 W., in Pre-emption Cash Entry No. 4211, made by Wm. Tuchenhausen July 12, 1890, patented Nov. 3, 1891.

S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28, Twp. 14 N., R. 16 W., in Pre-emption Cash Entry No. 565, made April 26, 1890, by Wm. H. Longley, patented Jan. 24, 1895.

N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , sec. 28, Twp. 14 N., R. 16 W., entered as a Homestead No. 4943, Cash Certificate 564, by A. W. Merrick, March 28, 1891, patented May 11, 1894.

E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , and lots 1 and 2 of sec. 18, Twp. 13 N., R. 14 W., in Timber and Stone Cash Entry No. 5498, made by John Kelly, Aug. 24, 1894, patented May 11, 1895.

E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of sec. 22, Twp. 14 N., R. 14 W., in Timber and Stone Cash Entry No. 7473, made by Peter Miller May 1, 1908, patented Jan. 21, 1909.

W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , sec. 20, Twp. 14 N., R. 15 W., in Timber and Stone Cash Entry No. 379, made by Ernest R. Kilburn Oct. 29, 1892, patented July 19, 1893.

E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , of sec. 20, Twp. 14 N., R. 15 W., in Timber and Stone Cash Entry No. 1179, made by Simon C. F. Cobban Aug. 31, 1899, patented June 28, 1900.

[675]

NE.  $\frac{1}{4}$ , Sec. 26, Twp. 14 N., R. 16 W., in Timber

and Stone Cash Entry No. 727, made by John P. Boileau Oct. 22, 1894, patented May 11, 1895. NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of sec. 28, Twp. 14 N., R. 16 W., in Timber and Stone Cash entry No. 1117, made by Anna A. Rowe Sept. 11, 1899, patented June 28, 1900.

It is further stipulated that the Government has no right to recover in this case for the value of the timber cut from any of the lands hereinbefore particularly described, after the date of settlement and filing the application to enter or purchase same respectively as hereinabove stated.

It is further stipulated and agreed that Township 11 North, Range 15 West, and Township 11 North, Range 16 West, Montana Principal Meridian, at all the times mentioned in the complaint herein and until May, 1902, were unsurveyed public lands of the United States with the exception of the following tracts of land in said Township last mentioned which were surveyed on the respective dates following, to wit:

That portion of sections 8, 9, 10 and 11 lying north of Hellgate River as it existed at the date of such survey to wit, July 17, 1874, and section 7 surveyed January 14, 1885. Provided, however, that this stipulation shall not be construed as either admitting or denying the existence of mining locations or patented mining claims in said townships or either of them, and proof of the existence thereof, if any, is not affected by this stipulation.

It is further stipulated that all of the lands described in the complaint herein are situated within



the forty-mile limits of the Northern Pacific Railroad grant.

T. H. SELVAGE,

FRANK HALL,

Attorneys for Plaintiff.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant. [676]

**[Motion to Amend Complaint, etc.]**

Thereupon plaintiff moved the Court for leave to amend the complaint on file herein on its face, by adding to the last line of the prayer of said complaint, the following: "And for interest thereon."

To the allowance of such amendment the defendant objected, which said objection was overruled by the Court, and to the overruling of which said objection the defendant excepted.

**Defendant's Exception No. 39.**

Thereupon argument was made to the Court and jury by counsel for plaintiff, and in the course of said argument, said counsel stated that after the introduction of all the evidence in the cause and making allowance for the eliminations noted during the introduction of said evidence, that plaintiff claimed defendant had cut or converted or was otherwise responsible for approximately sixteen million board feet of timber. [677]

Thursday, February 6, 1913.

Thereupon the respective counsel for the parties resumed their arguments to the Court and jury.

Friday, February 7, 1913.

Thereupon the respective counsel for the parties resumed their arguments to the Court and jury.

The above and foregoing testimony was all the testimony offered or received in the case.

**[Instructions Requested by Defendant.]**

That in accordance with the rules of this Court and prior to the close of the evidence hereinbefore set forth and before the making of any argument to the jury, defendant presented to the Court certain instructions, in writing, which he requested that the Court would give to the jury.

That the said instructions so requested by defendant were and are, respectively, in the words and figures and numbered as follows:

**I.**

The fact that the defendant happened to be a stockholder or an officer of a corporation, which corporation may have been guilty of conversion, does not, of itself, in the absence of his personal participation in such conversion, render him individually liable therefor.

**II.**

One does not become liable merely because he does not endeavor to prevent an act of conversion.

**III.**

In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find [678] that the defendant never came into possession of the timber, and never

purported to assume or assumed control over it, then your verdict must be for the defendant.

#### IV.

I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders, liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut.

#### V.

If you find that any of the timber, for the conversion of which this action is brought, belonged to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them, the purchase price which was received for such timber so converted was paid to any corporation in which the defendant was a stockholder or officer, yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, nor does this constitute a conversion

by defendant of the plaintiff's property. [679]

#### VI.

I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant.

#### VII.

I instruct you that conversion consists in an act of wilful interference with any chattel without lawful justification, whereby the person entitled thereto is deprived of possession of it. The chattels for the conversion of which this action is brought consist of timber or lumber claimed to be owned by the United States, and if you find that the United States did own this timber or lumber, yet, as matter of law, if the defendant in this case did not interfere with the possession of the United States in or to the timber or lumber, for the conversion of which this action is brought, then your verdict must be for the defendant.

#### VIII.

The Court instructs the jury, as matter of law, that the burden of proof is upon the plaintiff to establish every element of its case, and it is for it to do this by a preponderance of the evidence; and if the jury find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury will find for the defendant.

#### IX.

The burden of proof is on the plaintiff not only to



establish by a preponderance of the evidence that timber has been unlawfully taken from the lands involved in this controversy, or from some portion thereof, but it is also incumbent [680] upon the plaintiff to show, by a preponderance of the evidence, by whom the same was taken, and the quantity thereof, and I instruct you that, even if you should be satisfied from the evidence that timber had been unlawfully converted, and that the defendant was responsible therefor, nevertheless, if, from the evidence, you are unable to ascertain the quantity or extent of the timber taken, your verdict must be for the defendant, and, in this same connection, I instruct you that you are not permitted to guess at the quantity taken or to speculate as to the amount. You must, in such case, find a basis, in the preponderance of the evidence, for your computation in computing the amount of timber taken.

### X.

A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in section 22, township 14 north, range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and to keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to

property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, [681] sale, or disposition. Even a knowledge upon A. B. Hammond's part that Boyd was an employee of the corporation and was cutting timber for the corporation, would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd's cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd.

### XI.

If you believe from the evidence that Henry Hammond, during the period while the Edgar claim was cut, was the sole owner of the Bonner mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber.

### XII.

If you find from the evidence that timber was cut from Lot 10, in section 18, by the Big Blackfoot Milling Company at a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut

contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said timber. If he knew nothing about the taking thereof, and took no [682] personal part therein, he would not be liable, although the corporation in which he was a stockholder and director would be liable.

### XIII.

Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita Mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof.

### XIV.

If you find from the evidence that the Montana Improvement Company erected the Bonita mill and sold the same to Fred A. Hammond, and that Fred

A. Hammond in turn sold the same to George W. Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant A. B. Hammond had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs, is a question for the jury. But even if the Montana Improvement Company should be found by [683] you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of the Montana Improvement Company, or was an officer thereof. As already said to you, in the case of a corporation a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion.

Thereupon the Court instructed the jury as follows:

### **Instructions of the Court to the Jury.**

The COURT.—Gentlemen of the jury, as I suggested to you at the moment of recess, all that re-



mains for a final submission of this cause to you for your consideration, is that the law shall be stated to you which must govern you in arriving at your verdict. That is required to be given to you by the Court, and it is an obligation cast upon you by the law that you will observe the principles that are stated to you by the Court in your deliberation on the evidence for the purpose of reaching your verdict.

If, during the course of the trial, either in the taking of evidence or during the arguments of counsel suggestions have been made to you as to what counsel conceive the law to be in any particular relating to this case, you will entirely discard such suggestion from your consideration, not necessarily because counsel may have been mistaken in stating what they believe to be the law; but to avoid any confusion on your part as to what the law is by which you are to be governed, it must be taken by you [684] from the Court. This is so for the reason, as suggested to counsel during the progress of the argument, that the law provides a method of reviewing any error committed by the Court in giving the jury the law of the case; whereas, on the other hand, should the jury give ear to and act upon suggestions made by counsel, there would be no tangible means to correct any error committed by you in that regard.

Now, with these preliminary considerations I shall proceed to state to you the principles that in my judgment pertain to this case, and which you will apply to the evidence in the consideration of the evidence.

This is an action by the Government to recover from the defendant A. B. Hammond the value of a

large quantity of lumber—stated in the complaint to amount to 21,185,410 feet, board measure—the property of plaintiff, alleged to have been appropriated and converted by defendant. In that respect it is alleged by the plaintiff that this lumber before its manufacture was in the shape of timber standing and growing upon certain public lands belonging to plaintiff described in the complaint, and that while so standing upon plaintiff's said lands and the property of plaintiff, the defendant unlawfully and without right entered upon said lands, and cut down and felled it, carried it away and manufactured it into lumber, and sold and converted it to his own use and that of certain corporations named in the complaint. That is to say, the complaint alleges, in substantive effect, not that the defendant individually and unaided took this great quantity of lumber for and by himself alone, but that it was done through the instrumentality of the corporations named of which it is alleged the defendant was at the time the general manager [685] directing their business and operations in that regard, and that it was in this capacity that defendant committed the acts complained of through the aid and assistance of such corporations and by that means converted the lumber to his own use and that of said corporations, whereby it was wholly lost to the plaintiff. It is charged that the acts of the defendant in taking and converting the lumber were committed wilfully and knowingly and with full knowledge that it was the property of plaintiff and that neither defendant nor said corporations had any right whatsoever thereto.

Should you find these allegations of the complaint to be true; that is, should you find that plaintiff's lumber in the quantity alleged, or in any less quantity, has been taken by the defendant for the purpose and under the circumstances counted upon, then under the law plaintiff will be entitled to a verdict against the defendant for the entire quantity of lumber so taken. This is so because the manner of the alleged taking and appropriation, if true, constitutes what is known in the law as a trespass or tort, in other words, a wrongful taking of property, and in such form of action each individual engaged in the wrongful act complained of is personally responsible for the whole amount of damage suffered through such wrong, no matter how many may have participated or been concerned therein and whether he has himself benefited much or little by such wrong. The law does not undertake to apportion between a number of persons engaged in a tortious or wrongful act the extent of each man's individual responsibility as between themselves; they are left in that regard where their acts leave them. It gives to the party injured by the wrong a right of action for its redress, and where the act is committed by more than one he [686] may sue one or more or all as he sees fit and recover the entire loss to which he has been subjected from the one or more he elects to sue. It will not be material in this case, therefore, should you find that plaintiff's property has been taken by defendant in the manner alleged, whether the defendant reaped the whole or only part of the fruits of such taking; he would be responsible to plaintiff in either event for

the entire loss suffered by it, precisely as if he had received all the benefit therefrom. On the other hand, the party injured has under the law but one right of action for the wrong, and if he elects to sue one of a number of wrong-doers or joint tort-feasors, as they are termed in the law, and fails to secure full redress, his right is at an end and he cannot then resort to further action against the others.

You will understand, in determining defendant's responsibility, that the mere fact that the defendant happened to be a stockholder or an officer of a corporation which may have been guilty of converting the lumber in question, and of which he may have received a part of the benefit, would not of itself, in the absence of some showing of his personal participation in such conversion, render him individually liable therefor. There must appear some act on his part disclosing an intent and purpose to aid and assist in such wrongful act of a character to show that he was aware of the purpose intended to be accomplished. Participation, in the sense here employed, does not mean a mere passive acquiescence in the acts of others when no active aid is given or encouragement lent to the commission of the wrong. In other words, to make the defendant liable the evidence should show, not only that the lumber in question was the property of the United States, but that the defendant Hammond either directly or through his agents, or jointly with some other person, did some [687] act which was inconsistent with such title and right of possession of the plaintiff and tended to some positive extent to deprive it wrong-



fully of its property. If any such acts by the defendant are shown by the evidence, then the defendant is liable.

If you find that any of the timber for the conversion of which the action is brought, belonging to the United States, was taken and converted by W. H. Hammond, sometimes called Henry Hammond, or G. W. Fenwick, or Fred Hammond, or any of the corporations named in the complaint, but without the aid, connivance or participation of the defendant in any manner, then although the proceeds of such conversion or some part thereof may have been subsequently paid to or came in the course of business to a corporation of which the defendant was a stockholder or officer, the defendant would not be liable for timber or its proceeds so converted. But if you find that timber so taken and converted, although ostensibly taken in the name and for the benefit of said parties named, or any of them, was in fact taken for the benefit of defendant and his associates, with the aid, connivance and at the direction of the defendant in the manner alleged, then the defendant would in law be a participant in such taking and would be personally liable therefor, no matter where the proceeds eventually went. Any act of wilful interference with property such as that sued for herein, without lawful justification, whereby the person entitled thereto is deprived of its possession, is a conversion. A person may be guilty of a conversion of property without himself personally and directly performing the act of taking or carrying it away. If it is taken by his aid and con-

nivance or at his instigation or direction, although the physical taking is by and in the name of others and without his [688] immediate presence, he is nevertheless responsible as a participant.

The theory advanced by the plaintiff in this case as to the method pursued in the alleged conversion is that the lumber sued for was taken as the result of a continuing series of acts covering a number of successive years, but all a part and parcel of one general unlawful scheme and arrangement entered into between the defendant and his associates under the guise and form of different corporations organized by them with the intent, and designed to accomplish their purpose, of appropriating such lumber; and that the operations to that end were carried on by such corporations by the means of establishing different mills and logging camps in the names of, or conducted by, different individuals or corporations, but all in fact connected and acting in concert, and all under the general direction and management of the defendant for said corporations. Not that the defendant was absolutely in control of such corporations or nominally their general manager, but that the operations carried on to take and appropriate the plaintiff's lumber were in a general way under defendant's direction and control. If you find that this theory is sustained by the evidence, it would establish an unlawful taking and it will not be material to the defendant's responsibility that he should be shown to have been immediately present on each occasion that lumber was taken and personally directing the operations. It will be sufficient if it appear that any lum-

ber so taken was cut and carried away as a result of the general directions or instructions of the defendant in pursuance of such concerted plan, and was subsequently appropriated by defendant for the benefit of himself and the corporations named with a knowledge [689] that it was the property of the plaintiff.

In determining the truth of this theory, you may consider the relationship, if any, by blood, marriage or otherwise, shown to exist between the defendant and those immediately employed or engaged in the mills and logging camps in taking off the timber during the period involved from the lands in question, and all other facts and circumstances shown which in your judgment tend to throw light upon the question of the defendant's responsibility in the premises.

A citizen should not be lightly held responsible for a violation of the rights of the Government so serious as that here alleged, but if the evidence, after a careful consideration of it in all its bearings, warrants that conclusion, it will be your duty to so find.

The burden of proof as to the facts alleged in the complaint rests upon the Government. Being the plaintiff, it is called upon to establish the facts on which its right of recovery depends by a preponderance of the evidence; that is, by evidence which in the judgment of the jury is to some extent stronger and more satisfactory than that which is opposed to it. This rule does not require the plaintiff to produce the greater number of witnesses to any fact, for the evidence of one witness or of a circumstance may be more satisfactory to the jury as tending to estab-

lish a fact than that of a dozen witnesses opposed to it. All that is required is that the evidence produced by the plaintiff shall be regarded by the jury as more satisfactory and reliable as the basis of a verdict than that which contravenes it. The case is not governed by the rule in criminal cases requiring proof beyond a reasonable doubt. While the wrong alleged against the [690] defendant is a serious trespass, it is purely a civil wrong and not a criminal act. If the evidence is evenly balanced between the parties, and there is no preponderance in favor of plaintiff, then plaintiff is not entitled to recover.

As to any special defense set up by defendant, there the burden of proof rests upon the defendant to establish such defense to a like extent. In this respect the defendant pleads in justification of the cutting and conversion of part of the timber in question the right so to do under the act of June 3d, 1878. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain States and territories, to cut for building, agricultural, mining or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in the State or territory of which the parties cutting are residents.

The word "residents" as herein used includes domestic corporations, that is, corporations organized and existing by virtue of the laws of the State or territory wherein they are cutting and removing timber from the public domain.



This authority is given subject to regulations authorized to be made by the Secretary of the Interior, for the protection of the remaining timber and undergrowth. Pursuant to the authority thus conferred, the Secretary of the Interior, on August 5th, 1886, prescribed, among others, the following regulation:

“Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act, [691] shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions, if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid. (5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall

at all times be subject to the inspection of the officers and agents of this department. (6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or territory where it grew.”

The regulation just quoted is a lawful and reasonable one and imposes upon a person or corporation engaged, after its promulgation, in conducting a saw-mill, or engaged to a considerable extent in such cutting, or who makes a business of cutting timber on mineral lands and selling it, to keep the record prescribed above; and without the observance of which such cutting cannot legally be done. In this case defendant has [692] offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by defendant and admitted, touching the character of the land along the Hellgate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

In this connection and as bearing on the question

of such good faith, you will understand that the phrase "said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry," as used in the act of June 3d, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and to the persons cutting. If the land in question is worth more for agricultural purposes than mining, it is not mineral land within the meaning of the act, although it may contain some measure of gold or silver or other valuable [693] minerals. This is also true of timber lands. If the lands along the Hellgate River from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the act of June 3d, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land it is taken at the peril of being held responsible therefor.

In determining the question as to the good faith

with which any such cutting and removal was done, you have a right to consider whether it is reasonable and probable that one cutting and removing timber from such lands in the honest belief that he had a right so to do would have been likely to ignore the rules and regulations provided by the law for the cutting of timber on such lands; and if you find that such course does not accord with your reason and judgment, then you are not bound to believe the testimony of those doing such cutting that they were acting in good faith therein.

The defendant seeks also to justify the cutting and removing of the timber from the SE.  $\frac{1}{4}$  of section 28, township 14 north, range 14 west, by reason of the fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United [694] States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a wilful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him, acting under his direc-



tion and control, cut and converted the timber in question from the SE.  $\frac{1}{4}$  of said section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold.

The defendant further sets up in his answer that the cutting and removing of the timber from the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of section 18, township 14 north, range 15 west, was authorized by a permit issued by the Secretary of the Interior on January 16, 1892, to the Blackfoot Milling and Manufacturing Company under and by virtue of the provisions of the Act of March 3, 1891, which permit was afterwards transferred to the Big Blackfoot Milling Company. The permit so issued was made subject to certain conditions, restrictions and limitations therein set forth and which have been read to you. The act provides that the Secretary of the Interior may designate the sections or tracts of land and prescribe the conditions, limitations and restrictions under which the cuttings shall be carried on. In this instance, as stated, the Secretary of the Interior did prescribe the conditions, restrictions and limitations under which said corporations could cut timber [695] from the lands last above described, by inserting them in the permit itself. These conditions, restrictions and limitations were reasonable, and it was the duty of those acting under such permit to comply therewith. If you find that the said corporations named, acting under and through the direction and control of the defendant, cut and removed the timber from the lands last described, without complying

with the conditions, restrictions and limitations embodied in said permit, then neither they nor the defendant acquired any right whatsoever in and to the timber so cut and removed, but such cutting was a trespass and the plaintiff is entitled to recover for the value of such timber if converted as alleged. Moreover, it was the duty of those cutting under said permit to know and ascertain the lines bounding the land from which they were entitled to cut timber thereunder, and the fact that they may have misapprehended their rights under such permit will not justify a cutting outside such lines, nor will it mitigate the damages resulting therefrom. In other words, although the jury may find that defendant or those under his direction cut outside of the lands included in such permit under the mistaken belief that the permit included the lands from which they did cut, they would in law, as to the lands outside of this permit, be trespassers and liable to the plaintiff for the value of any timber so cut.

You will bear in mind that the plaintiff has, at the trial, abandoned its right to recover for the timber cut and removed from the NW.  $\frac{1}{4}$  of section 2; the SE.  $\frac{1}{4}$  of section 8, and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of section 22, all in township 14 north, range 14 west, and you will eliminate from your consideration all evidence as to the cutting and removing of timber from these lands [696] included within such abandonment.

If the jury find that the timber sued for or any portion thereof was taken and converted by the defendant and his associates as alleged, then it will be

necessary to determine the quantity and value of that so taken in order to fix the amount of your verdict. In a case such as that disclosed by the evidence this is an inquiry of some difficulty. The transactions involved not only date far back in time but cover a series of years, and that alone would tend to render proof more difficult than if those transactions were more recent. But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he has made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are [697] wholly unable to determine it, then, even though you

find the defendant responsible, the plaintiff cannot recover beyond nominal damages.

It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of \$211,854.10. But should you find that plaintiff is entitled to recover, you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate, and that is always subject to control by the evidence in the case.

If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.

If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the



law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of [698] conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.

In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.

Should your conclusion be that the plaintiff has not shown itself entitled to recover, then your verdict should be for defendant.

Now, gentlemen of the jury, that comprises all the specific suggestions that I deem it necessary to submit for your consideration. There are some general features of the law, however, which it is pertinent and proper that I should suggest to you.

As I have stated, you are bound to observe the law as given you by the Court in your deliberation upon the evidence for the purpose of reaching your verdict, but the question as to what facts have been shown by the evidence that has been introduced before you is one entirely for your determination. With that function the Court neither has the right nor the disposition to in anywise interfere.

It is the privilege of the Federal Courts, if they see fit to comment upon the evidence, and give the jury their views of what it tends to show, but I have rarely felt called upon to [699] comment upon the facts because my observation of the class of jurors we get in these courts is such that I find that they, as a rule, are entirely capable of drawing correct deductions from the evidence and formulating their verdicts, unaided by any suggestions from the Court in regard to the facts. It strikes me that under ordinary circumstances that is the fairer way, so I have rarely indulged in the practice of commenting upon the evidence to any extent.

You have the aid of counsel in your consideration of the evidence in the case through their arguments; but I wish to say to you that you are only to accept the suggestions of counsel to the extent that they tend to enlighten you, not alone as to the evidence that has gone in, but as to the proper deductions to be drawn therefrom, and the facts to be found based thereon. If the suggestions of counsel are calculated to carry you outside of that line, then, of course, you will entirely disregard them. Counsel very frequently, in the heat of argument and in their zeal, are inclined to suggest views of the evidence and deductions to be drawn therefrom which in fact are not warranted. This is entirely excusable because, as I say, in the heat of argument, through that spirit of partisanship which is proper in an advocate, counsel are often unconsciously led to assert what the evidence does not support, and the jury is cautioned not to accept anything which does not fall in

with their own good reason and judgment deduced from a fair and careful consideration of the evidence in the case; because, gentlemen, eventually upon your shoulders alone rests fully and completely the responsibility of the verdict which you must render in this case. The fact that you may be led into error by some suggestion which should have found no place in your consideration will not relieve you; therefore, I say that while you are entitled to the enlightenment that counsel may give, [700] if they have inadvertently misstated a fact, or inadvertently sought to draw deductions from facts admittedly in the record which do not accord with your judgment, you must ignore them and draw conclusions for yourselves independently and aside from any suggestion of counsel.

You are, also, necessarily the judges of the credibility of the witnesses. This is because you pass upon the facts. Now, you are all intelligent men, and perhaps it is really unnecessary for me to state in any detail the method by which we determine the credibility of witnesses. A witness going upon the stand is presumed to tell the truth. That does not mean that he always will tell the truth, and that does not mean that the jury is bound to find that he has always told the truth; but a witness is entitled in going upon the witness stand to the presumption in his favor that he is telling the truth. You are only entitled to determine that he has not by certain well known tests which you apply sitting as judges of the effect of his testimony as given. You observe the manner of the witness and his general character as

developed in his manner of testifying; how fair and unprejudiced or otherwise he may appear from the testimony given by him; whether there appears on his part any interest in the case growing out of any circumstances that appear in the case, and how far his evidence accords with that of other evidence which you are inclined to believe; how far it is inconsistent with other evidence in the case, and from those things you make up your minds as to the degree of credibility which you will accord to the testimony of any witness who appears before you.

If a witness is shown to have made statements at some previous time at variance with his evidence upon the witness [701] stand, and the jury is of the opinion that that has not been the result of inadvertence or mistake, it should make you cautious in viewing all the evidence of that witness.

If you are satisfied that a witness has come upon the stand and deliberately told you what was untrue, not as the result of mistake or inadvertence, but with intent to deceive, then you have the right to discard his entire evidence from the case, unless you are satisfied from the other evidence that it is in some respects true.

Now, in this case a very large part of the evidence has been submitted before you by deposition. The law draws no distinction, primarily, as between the effect of evidence introduced before a jury by deposition, and that which is given orally from the witness stand, but, of course, it will readily strike you that you have not before you all the same tests for determining the degree of credibility that you will



accord to a witness whose evidence is read to you, as you would if he had appeared on the witness stand; but you should apply to evidence given in the form of depositions the same rules so far as compatible with the circumstances, as you do to those witnesses testifying in open court. You observe the character of the testimony, how far it appears to be reasonable, and how far it accords with other evidence in the case, and from that you make up your mind how far you will accord credibility to that character of evidence. Some of the other tests I have mentioned you, of course, cannot apply in the absence of the witness.

It is hardly necessary for me to suggest to you that this is a case of great importance not only to the Government but to this defendant himself. The charge, as I have suggested, is not a criminal one, but it is nevertheless a serious one. If the Government has lost the large amount of timber that is alleged [702] here, or even less than that entire amount, and it has been lost through the wrongful act of this defendant, then, regardless of the consequences to the defendant, or those connected with him, the Government is entitled to have that wrong righted by a recovery.

On the other hand if this charge has been made against the defendant without circumstances of justification, then he is equally entitled to have that charge refuted by a verdict at your hands in his favor. That makes the issue an important one in this case. I wish to charge you, gentlemen of the jury, with all solemnity, that you must determine

this case solely and alone from the evidence in this case, and through no other consideration.

Some suggestion was made to you during the argument that perhaps this case was instigated through some sentiment of malice or other sinister motive. I do not know that counsel intended that suggestion with any serious idea of intimating to you that you could be affected to any consideration of that kind, but aside from the fact that there is no evidence in this case to warrant you in reaching any such conclusion, it could make no possible difference to you if this suit had been instigated by the worst enemy that the defendant had in the world, and that is because if one is under obligation to another, either contractual or as a result of a wrong, for which that other has a right to sue in the courts, it cannot make a particle of difference in the consideration of the trying tribunal what motive actuated the bringing of the action. All the tribunal has to do, all you have to do, and all that you can under your oaths do, is to determine the case from the facts that are shown by the evidence. If a plaintiff, however malicious his purpose may be in bringing the suit, is entitled under the law to a recovery, he is entitled to it precisely the same as [703] though it had been brought with the most innocent and sincere purpose to recover his rights. No matter what degree of malice might appear behind a case of this kind, it would be an injustice for the jury to be actuated to any extent by a consideration of that malice by deciding unjustly; therefore, I say, that consideration is something with which you have nothing what-

ever to do. You and I sit here simply and solely to determine the rights of those parties under the law, and as disclosed by the evidence, and I am sure that none of you will permit yourselves when you retire to your jury room to be actuated by other than a full, fair and impartial consideration of the evidence in this case.

Now, gentlemen of the jury, as usual in such cases, the clerk will have prepared forms of verdict which you will find accord with the suggestions I have made to you. If you in your wisdom should reach a conclusion that this plaintiff is entitled to a verdict at your hands, then you will find a form in which you can answer the question, which, as I have heretofore suggested to you, should cover the value of any timber according to the measure of damages I have given to you, that has been unlawfully taken from it, with interest on that value from the time of the conversion; but should your verdict be that the plaintiff has failed to maintain its action, and you find for the defendant, then you will find a form for that finding.

In the Federal Court the verdict of the jury must be unanimous, and not by a divided jury as under the State system.

Have counsel any suggestions to make?

Mr. HALL.—I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court. [704]

The COURT.—The rate of interest is the legal rate of seven per cent.

**[Exceptions of Defendant to Charge of Court to Jury.]**

Thereupon defendant excepted to the charge of the Court to the jury, as follows:

Mr. WHEELER.—First of all, with regard to the regulations of the Secretary of the Interior as to the matter of keeping records, getting affidavits, and so forth, I except to that portion of the instructions, and particularly that part thereof that holds the regulation to be lawful and reasonable. Next, that the said regulation imposed a duty upon one situated as Mr. Fenwick was. I claim that the law did not compel him to do that.

Next, as to the balance of the rules and regulations adopted: first, those that were in force when Fred Hammond and when Mr. Fenwick began their operations of their mills. I claim that those regulations were kept, and except to the Court's instructions because the instructions do not cover that period and eliminate it.

The COURT.—I only referred to the period after the promulgation of the rules.

Mr. WHEELER.—Yes. Next because it does not cover an instruction to the jury which would imply that all of those regulations save the particular one were kept. The one I refer to being the one with regard to affidavits, keeping books, records, etc. From my standpoint that is the only one that was not kept; all the rest being kept.

Next an exception to the Court's instruction defining mineral lands, and next as to its having been



necessary that mineral lands should be so defined during the period that Mr. Fenwick was operating the mill. I claim that there is an estoppel [705] or something in the nature of an estoppel against the Government—

The COURT.—In view of your suggestions during the trial, and from the fact that I could not sustain that view, I will state to the jury that there could be no such estoppel as you have suggested.

Mr. WHEELER.—That will necessitate my taking an exception to that instruction.

The COURT.—The theory advanced by counsel is that an estoppel grew out of the failure of the government to call for these records.

Mr. WHEELER.—We claim that the line of conduct of the Secretary of the Interior with regard to what they could do, and the repeated decisions of the Courts down two and a half years ago was a precedent which even the Government itself could not go back on and make that unlawful which was lawful.

The COURT.—That you will understand, gentlemen of the jury, the Court has instructed you does not have the legal effect of an estoppel such as suggested by counsel.

Mr. WHEELER.—Next, that portion of the instruction with regard to the mineral land, in which it is stated that it must be more valuable for mineral than for timber. I claim that if it is mineral it makes no difference what its value is so long as it has some value. I take an exception to that portion.

Next, with regard to the instruction as to the rights Edgar had upon the property as a pre-emptioner in cutting and disposing of his timber. I except to the Court's view of the law upon that point, particularly specifying that a man has the right to remove the timber not only for buildings, improvements and clearing purposes, but that he even may cut the timber for the purpose of [706] selling it and using the money to pay for his land.

With regard to section 18, township 14 north, range 15 west, and the matter of cutting under the permit, there is nothing in the evidence to show that the cutting actually done was not in accord with the conditions and that the burden of proof is not upon the defendant, but is upon the plaintiff to show the extent, where and wherein the terms of the permit were not complied with. I except to that portion which instructs with regard to said section 18 upon that ground.

Next, there was a portion of the instruction which seemed to imply that the defendant Hammond was in control of the corporation at the time the cutting was done on Government land.

The COURT.—I left that question entirely to the jury.

Mr. WHEELER.—I would have no objection to the Court's suggestion. The Court left it to the jury to decide as to the quantity and value of the timber taken. There is an implication in the instruction, inadvertent I think, that there is evidence in the case from which the jury could imply that it

was made more difficult for the Government to prove its case.

The COURT.—I said if the jury found that the character of the taking was such as to make it more difficult.

Mr. WHEELER.—But not to imply that circumstances were such?

The COURT.—That is a question for the jury. I leave that question to the jury, if they find that by reason of the wrongful taking it has made it more difficult.

Mr. WHEELER.—I take an exception to that. It may be hypercritical, and probably is.

The COURT.—Of course, you can save your exception.

Mr. WHEELER.—Yes. I may be wrong. Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances [707] is the value of the stumpage in the tree, and I think your Honor's instructions add to it another element.

I also except to your Honor's instructions with regard to interest.

DEFENDANT'S EXCEPTION TO THE FAILURE OF THE COURT TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT.

Thereupon defendant excepted to the failure and refusal of the Court to give the said instructions, and each of them, requested by said defendant, and heretofore in this Bill of Exceptions set forth and numbered, respectively, I to XIV, inclusive.

Thereupon, on Friday, February 7, 1913, at 3:05 P. M., the jury retired for deliberation.

**[Proceedings Had February 8, 1913, on Return of Jury into Court, etc.]**

Saturday, February 8, 1913, 10:10 A. M.

Thereupon the jury returned into court, and the foreman of the jury stated that the jury had not been able to come to any agreement as to a verdict as yet. The foreman stated that the jury would like to have read to it the testimony of Thomas G. Hathaway; Sidney C. Mitchell and Gust. Moser, and also the instructions of the Court regarding the liability of the members or the officers of a corporation.

Thereupon the entire testimony of the said witness, Sidney C. Mitchell, was read to the jury.

Thereupon the testimony of Thomas G. Hathaway, commencing at the beginning of said testimony, that is to say, the direct examination of said witness was read by counsel for plaintiff, in its entirety, down to and including the following question and answer contained in the direct examination of said witness:

Q. Did the Montana Improvement Company, or Eddy-Hammond [708] & Company, or the Missoula Mercantile Company, or any company, firm or corporation, of which A. B. Hammond was connected, continue to receive the product from the Fred Hammond mill at Bonita up until the time it ceased to operate?

A. We took the product of the mill; that is, one of the companies I was connected with.



Thereupon the following took place:

The COURT.—Now, gentlemen, I want to ask you as intelligent men, if this accords with your ideas as to the proper method of getting at the facts in this case, having this evidence reread to you in extenso in this way?

The FOREMAN.—It is simply for the purpose of refreshing the memory of one or two jurors. That is the only purpose of making this inquiry.

The COURT.—It is not proper to either party to refresh the memory of any juror who has a hazy memory of some particular testimony. If he has a hazy memory as to one feature of the case, he may likewise have a hazy memory as to another feature.

The FOREMAN.—The matter that we have been discussing is Mr. Hammond's connection with these corporations.

The COURT.—Well, now, gentlemen, the question of the connection of Mr. Hammond with these corporations runs throughout this entire case from beginning to end. The question of the relationship of the defendant to these corporations is something to be gathered from the testimony of every witness that mentioned the subject in his testimony. It would be unjust to Mr. Hammond on the one side and unjust to the government to undertake to determine the question of Mr. Hammond's responsibility from the testimony of one individual, or two individual witnesses if there is other evidence in the case bearing upon that subject. [709] I am willing to do everything in the world that I can to help you, but I do not approve of this rereading of the

testimony here at this time.

Mr. WHEELER.—To stop at this point in this witness' testimony would be most unfair to us. This witness in his cross-examination directly contradicts some of the statements he makes in his direct examination.

The COURT.—All of this evidence is before this jury. It is not as though only a part of it had been read and another part had never been read.

Mr. WHEELER.—Will your Honor kindly hear me through on this matter?

The COURT.—I am dealing with this jury. I cannot permit any interruption by counsel. I have dealt with a great many juries, and I want to aid this jury. I do not want to have the time of this Court and this jury consumed in a manner that from my experience and observation is going to result in no eventual enlightenment.

Mr. WHEELER.—This witness on his cross-examination says that he was mistaken as to some of the matters that have just been read in evidence.

The COURT.—I will not have any further explanation of this testimony or this evidence before this jury. Counsel have both had an opportunity to argue this case. I am not going to let them argue it again here. I have simply stopped to suggest to the jury that if we are going on in this way we will never get through with this case. The jury must reach their verdict in this case from all of the evidence. The question as to a certain fact does not necessarily depend upon the positive and direct declaration of a witness upon the stand, if there are

other [710] portions of the case in which circumstances have been shown which throw light upon that fact. I trust I make myself plain. It is not within the province of the jury to stop at the consideration of the evidence of any one witness in this case. They must, in order to do justice to these parties, consider it all. If there is a question in the mind of a juror as to some particular feature of some one witness, why, it is the very proper and usual thing to read the testimony of that witness, but not to have a large part of the record reread to the jury, which they have sat here and listened to. We will go on and finish the testimony of this witness.

Thereupon counsel for plaintiff continued reading the direct examination of the said witness, Hathaway, in its entirety, and until the close of the testimony of the said witness given upon said direct examination—the reading of said testimony beginning immediately following the question and answer hereinbefore set forth in this Bill of Exceptions as the point at which said reading had been interrupted by the Court.

Thereupon the Court retired from the courtroom for a few minutes, during which time the jurors consulted amongst themselves.

The FOREMAN.—(Upon the return of the Court.) The jury seems to come to the conclusion that they do not require the reading of Mr. Moser's testimony. Is there any way that counsel can agree not to read the balance of this testimony?

The COURT.—It is not a question for counsel at

all. Counsel have nothing to say about this. It is a question for the enlightenment of the jury. All of this evidence has been heard by the jury. If this evidence had never been recited to the jury [711] that would be a different thing, and then counsel would have something to say about it. Now, it is for the jury to say what they want their minds refreshed upon.

The FOREMAN.—They say that they do not wish any more of this.

The COURT.—Very well, we will stop.

Thereupon defendant offered to read the cross-examination and recross-examination of the said witness, Hathaway, and particularly that portion of the testimony of said witness relating as to what disposition was made of the product of the Fenwick mill at Bonita; but thereupon the Court refused defendant permission to read said testimony, comprising the cross-examination and recross-examination of said witness, or any part thereof—the Court remarking that it had stopped the reading of the testimony because the jury announced that they did not desire to hear any more. To which ruling of the court, defendant duly excepted.

#### **Defendant's Exception No. 40.**

Thereupon at 11:50 A. M. of Saturday, February 8, 1913, the jury retired for further deliberation, and at 9:35 P. M. of said day, returned into court and rendered a verdict in favor of the plaintiff and assessed the damages against the defendant in the sum of fifty-one thousand and forty dollars (\$51,040.00).



Thereupon the Court ordered a stay of execution for thirty (30) days.

The foregoing constitutes all the proceedings had and all the testimony offered and received on the trial of said action.

And now within the time required by law and the rules of this Court, as extended by the stipulations of the parties and the orders of the court, defendant proposes the foregoing [712] as and for its Bill of Exceptions to the rulings of the Court, made during the trial of the above-entitled action, and prays that it may be settled and allowed as correct.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant.

**Stipulations Concerning Bill of Exceptions.**

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action as follows:

(1) That the above and foregoing constitutes a full, true and correct Bill of Exceptions in the above-entitled cause as to the rulings made upon the trial of the above-entitled cause, and that the same may be settled and allowed as and for the Bill of Exceptions to such rulings.

(2) IT IS FURTHER STIPULATED that the Bill of Exceptions proposed by defendant, upon which the above and foregoing Bill of Exceptions is founded, and the Amendments thereto proposed by plaintiff, were each, severally and respectively, duly and regularly prepared, served, filed and presented, to the Court and to the Judge who tried said cause,

for the settlement thereof, and were settled by such Court and Judge, all within the time required by law and the rules of said court and upon the stipulation of the parties with the order of the Court entered thereon extending the time for the performance of said several and respective acts from time to time, without lapse, and from term [713] to term, without lapse, since and including the term during which the trial of said cause was had until and including the present term, to wit, the term of court commencing the first Monday in March, 1914.

Dated: May 13th, 1914.

JOHN W. PRESTON,

United States Attorney,

FRANK HALL,

Special Ass't to Attorney General,

Attorneys for Plaintiff.

W. S. BURNETT,

CHAS. S. WHEELER,

Attorneys for Defendant.

**Order Settling, Certifying and Allowing Bill of  
Exceptions.**

The foregoing Bill of Exceptions being now presented in due time and found to be correct.

I DO HEREBY CERTIFY that the said Bill is a true Bill of Exceptions.

Dated: May 16th, 1914.

WM. C. VAN FLEET,

United States District Judge, Northern District of  
California.

Received copy of *with* Engrossed Bill of Exceptions this 13th day of May, 1914.

JOHN W. PRESTON,  
United States Attorney,  
FRANK HALL,  
Special Ass't to Attorney General,  
Attys. for *Deft.*

[Endorsed]: Filed May 16, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[714]

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*In the District Court of the United States, in and for  
the Northern District of California, Division  
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
A. B. HAMMOND,  
Defendant.

**Bill of Exceptions to Order Taxing Costs.**

BE IT REMEMBERED, that upon the trial of the above-entitled action a verdict was returned by the jury in favor of the plaintiff herein and thereafter judgment thereon was duly entered against defendant for the amount thereof and for costs thereafter to be taxed, and that thereafter plaintiff duly and regularly served upon defendant and filed its memorandum of costs, and that included in said memorandum of costs were the following items:

“W. E. Bennett, Great Falls, Mont., mileage at .05¢ a mile, 460 miles, in State of Calif.....\$23.00  
 O. J. Reynolds, Helena, Mont., mileage at .05¢ a mile, 460 miles, in State of Calif.. 23.00  
 Sidney Mitchell, Oroville, Wash., mileage at .05¢ a mile, 806 miles in State of Calif... 40.30  
 Dan Graham, Missoula, Mont., mileage at .05¢ a mile, 460 miles in State of Calif.. 23.00  
 Wm. Green, Philmon Spur, Mont., mileage at .05¢ a mile, 460 miles in State of Calif.. 23.00  
 J. M. Keith, Missoula, Mont., mileage at .05¢ a mile, 460 miles in State of Calif..... 23.00  
 R. K. McLaughlin, Mullan, Idaho, mileage at .05¢ a mile, 460 miles in State of Calif... 23.00”

That thereafter said memorandum of costs came up duly and regularly for taxing before the clerk of the above-entitled court, and thereupon defendant objected to each and all of the items last mentioned, upon the ground that the said witnesses, referred to in [715] said items, came from without the District of Northern California, and that the only mileage which it was proper should be taxed as costs was, in the case of each of said witnesses, one hundred miles going and one hundred miles returning, or two hundred miles in all, which would result in the sum of ten dollars (\$10.00) as mileage for each of said witnesses, or in all, the sum of seventy dollars (\$70.00) for such mileage, instead of the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), as set forth in said memorandum of costs.

That thereupon the clerk overruled the said objec-



tion of said defendant as to each of said items and taxed said items at the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), including said sum in the total amount taxed as costs against defendant.

That thereafter, and in accordance with the rules of the court, defendant appealed from the said taxation by said clerk to the judge of the above-entitled court, making the same objection to each and all of said items as that hereinbefore noted, but that the Judge of said court sustained the taxation made by the clerk as hereinbefore set forth, taxing said items in the total sum of one hundred seventy-eight and 30/100 dollars (\$178.30), instead of in the sum of seventy dollars (\$70.00), demanded by defendant.

That the foregoing constitutes all the testimony, evidence and papers used upon the taxation of said costs by the clerk and upon the appeal from said taxation to the Court.

WHEREFORE, defendant prays that the costs as taxed against him be reduced by the sum of one hundred and eight and 30/100 dollars (\$108.30); and that the foregoing matters may more properly appear of record he proposes this as his bill of exceptions to the taxation by the clerk of the costs herein, and to the action of the court herein as aforesaid.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant. [716]

**Stipulation Concerning Bill of Exceptions to Order  
Taxing Costs.**

IT IS HEREBY STIPULATED that the above and foregoing constitutes a full, true and correct bill of exceptions to the order of the Judge confirming the taxation by the clerk of the costs herein and to the taxation of said costs by said clerk, and that the same may be settled and allowed as correct, and that said bill of exceptions has been duly and regularly presented and settled in due time.

JOHN W. PRESTON,

FRANK HALL,

Attorneys for Plaintiff.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant.

Dated: Sept. 25th, 1914.

**Order Settling, Certifying and Allowing Bill of  
Exceptions to Order Taxing Costs.**

The foregoing Bill of Exceptions being now presented in due time and found to be correct,

I DO HEREBY CERTIFY that the said Bill is a true Bill of Exceptions.

Dated: September 25th, 1914.

WM. C. VAN FLEET,

United States District Judge, Northern District of  
California.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [717]

*In the District Court of the United States, in and for  
the Northern District of California, Division  
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Petition for Writ of Error.**

A. B. Hammond, the defendant above named, feeling himself aggrieved by the verdict of the jury and the judgment entered thereon, on the 8th day of February, 1913 (and in certain rulings had in this proceeding prior thereunto, all of which will more in detail appear from the assignment of errors which is filed with this petition), whereby it was adjudged that plaintiff have and recover from the defendant the sum of fifty-one thousand and forty dollars (\$51,040.00), comes now and petitions said court for an order allowing him, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, for the correction of the errors so complained of, and also that an order be made fixing the amount of the supersedeas bond which the defendant shall give and furnish upon said writ of error, and that upon the giving of such bond, all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the said United

States Circuit Court of Appeals, in and for the said Ninth Circuit.

And your petitioner will ever pray, etc.

CHAS. S. WHEELER,

W. S. BURNETT,

Attorneys for Defendant.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [718]

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*In the District Court of the United States, in and for the Northern District of California, Division No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Order Allowing Writ of Error, etc.**

Upon motion of Chas. S. Wheeler and W. S. Burnett, attorneys for defendant in the above-entitled cause, and upon the filing of the petition for writ of error and assignment of errors herein:

IT IS ORDERED that the writ of error as prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by defendant upon said writ of error be, and the same is hereby fixed at the sum of Seventy-five thousand Dollars (\$75,000.00); and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded, pending the determination of



said writ of error by the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated: September 25th, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [719]

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*In the District Court of the United States, in and for  
the Northern District of California, Division  
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

### **Assignment of Errors.**

The defendant in the above-entitled action, in connection with its petition for a writ of error, alleges and avers that in the pleadings, records, proceedings trial and judgment in said action, there are manifest errors and for assignment of said errors, says:

1. The Court erred in overruling the demurrer of defendant to the complaint herein.

2. The reading to the jury after it had retired to deliberate upon its verdict, of the direct testimony, or part of the direct testimony, of a witness called on behalf of the plaintiff, namely, Thomas G. Hathaway, and at the same time denying to the defendant the right to read to the jury at said time testimony

given by said witness on cross-examination, which testimony last mentioned contradicted in many important particulars the testimony given by said witness on direct examination, and which said testimony last mentioned was so reread to the jury, upon the ground that thereby an irregularity was committed in the proceedings of the Court and jury, and an abuse [720] of discretion on the part of the Court, by which the defendant was prevented from having a fair trial, and in overruling defendant's objection thereto. (Exception No. 40.)

3. The failure of the jury to state how much, if any, of the verdict of fifty-one thousand and forty dollars (\$51,040) brought in by it against defendant, was composed of interest, the Court having instructed the jury that in fixing the amount of any verdict it might find for the plaintiff, the jury should include interest at the rate of seven per cent (7%) per annum on the value of any lumber converted from the date of such conversion to the present time, which defendant specifies as misconduct of the jury.

4. The Court erred in instructing the jury as follows:

“The defendant pleads in justification of the cutting and conversion of part of the timber in question the right so to do under the act of June 3d, 1878. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain states and territories, to cut for building, agricultural, mining or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws

of the United States, except for mineral entry, in the state of territory of which the parties cutting are residents.

“The word ‘residents’ as herein used includes domestic corporations, that is, corporations organized and existing by virtue of the laws of the State or territory wherein they are cutting and removing timber from the public domain.

“This authority is given subject to regulations authorized to be made by the Secretary of the Interior, for the protection of the remaining timber and undergrowth. Pursuant to the authority thus conferred, the Secretary of the Interior, on August 5, 1886, prescribed, among others, the following regulation:

“ ‘Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this Act shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions, if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose [721] of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricul-

tural, mining or other domestic purposes within the State or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid. (5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department. (6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or territory where it grew.'

"The regulation just quoted is a lawful and reasonable one and imposes upon a person or corporation engaged, after its promulgation, in conducting a saw-mill, or engaged to a considerable extent in such cutting, or who makes a business of cutting timber on mineral lands and selling it, to keep the record prescribed above; and without the observance of which such cutting cannot legally be done. In this case defendant has offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the Statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by defendant and admitted,



touching the character of the land along the Hellgate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

“In this connection and as bearing on the question of such good faith, you will understand that the phrase ‘said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry,’ as used in the Act of June 3d, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and to the persons cutting. If the land in question is worth more for agricultural purposes than mining it is not mineral land within the meaning of the Act, although it may contain some measure of gold or silver or other valuable minerals. This is also true of timber lands. If the lands along the Hellgate River from which a portion of the timber in question was cut were more valuable for the timber standing and growing thereon than for the minerals contained therein then such lands were not mineral in character and not subject to entry under

the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the Act of [722] June 3d, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land, it is taken at the peril of being held responsible therefor."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the rules and regulations of the Secretary of the Interior, referred to therein, were, or that any of them was, lawful or reasonable.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it in effect instructed the jury that such rules applied to one operating under appointment or agency for another person, as was George W. Fenwick.

To which portion of said instruction defendant duly excepted.

(c) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that defendant had offered no evidence tending to show a compliance with said Rules and Regulations, and instructing the jury that for that reason defendant had failed to bring himself within the protection of the said Stat-

ute of 1878, and that defendant was not relieved of liability for any timber so cut since said Regulation was adopted, by reason of the fact that said lands might have been in fact mineral in character.

To which portion of said instruction defendant duly excepted.

(d) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury as to the meaning of the words, "Mineral Lands," as used in the [723] Act of June 3d, 1878, and particularly in that portion of the instruction wherein it stated that if the lands along the Hellgate River, from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and that neither defendant nor corporations named had a right to cut timber from such lands under the Act of June 3d, 1878.

To which portion of said instruction defendant duly excepted.

5. The Court erred in instructing the jury as follows:

"The defendant seeks also to justify the cutting and removing of the timber from the S. E.  $\frac{1}{4}$  of Section 28, Township 14 North, Range 14 West, by reason of the fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar

Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a willful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him, acting under his direction and control, cut and converted the timber in question from the S. E.  $\frac{1}{4}$  of said Section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements, is in law a willful [724] trespasser, without regard to the question of his good faith in making the entry.



To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction last hereinabove quoted and set forth, wherein it instructed the jury that if defendant was liable for all or any part of the timber cut and removed from the so-called Edgar Claim, then that he was liable for the full value of the timber so cut and carried away at the time it was sold, in that thereby the court took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

6. The Court erred in instructing the jury as follows:

“The defendant further sets up in his answer that the cutting and removing of the timber from the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of Section 18, Township 14 North, Range 15 West, was authorized by a permit issued by the Secretary of the Interior on January 16, 1892, to the Blackfoot Milling & Manufacturing Company under and by virtue of the provisions of the Act of March 3, 1891, which permit was afterwards transferred to the Big Blackfoot Milling Company. The permit so issued was made subject to certain conditions, restrictions and limitations therein set forth and which have been read to you. The Act provides that the Secretary of the Interior may designate the sections or tracts of land and prescribe the conditions, limitations and

restrictions under which the cutting shall be carried on. In this instance, as stated, the Secretary of the Interior did prescribe the conditions, restrictions and limitations under which said corporations could cut timber from the lands last above described by inserting them in the permit itself. These conditions, restrictions and limitations were reasonable, and it was the duty of those acting under such permit to comply therewith. If you find that the said corporations named, acting under and through the direction and control of the defendant, cut and removed the timber from the lands last described without complying with the conditions, restrictions and limitations embodied in said permit, then neither they nor the defendant acquired any right whatsoever in and to the timber so cut and removed, but such cutting was a trespass and the plaintiff is entitled to recover for the value of such timber if converted as alleged. Moreover, it was the duty of those cutting under said permit to know and ascertain [725] the lines bounding the land from which they were entitled to cut timber thereunder, and the fact that they may have misapprehended their rights under such permit will not justify a cutting outside such lines, nor will it mitigate the damages resulting therefrom. In other words, although the jury may find that defendant or those under his direction cut outside of the lands included in such permit under the mistaken belief that the permit included the lands from which they did cut, they would in law, as to the lands outside of this permit, be trespassers and liable to the plaintiff for

the value of any timber so cut.”

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the burden of proof rested upon the defendant to establish that the cutting and removal of the timber had been done in accordance with the conditions, restrictions and limitations contained in the permit mentioned in said instruction.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the fact that those cutting under the permit, referred to in said instruction, may have misapprehended their rights thereunder would not mitigate damages resulting therefrom, and that they would be liable for the value of any timber so cut. The Court thereby took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

7. The Court erred in instructing the jury as follows:

“But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing

the exact extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which [726] the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he has made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are wholly unable to determine it, then, even though you find the defendant responsible, the plaintiff cannot recover beyond nominal damages."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the manner of the taking of the timber by defendant might have been such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, and that in such a case a less degree of certainty in establish-



ing the extent of plaintiff's damage is required than otherwise.

To which portion of said instruction defendant duly excepted; and defendant assigns the giving of such portion of said instruction as error as an abstract proposition of law, and furthermore, in any event inapplicable to the evidence, there being no evidence whatsoever that the manner of the taking of the timber was such as to enhance the difficulty of the plaintiff in establishing the exact extent of the wrong committed upon it, and, therefore, to permit a recovery of damages on proof less certain as to the extent of such damages than would otherwise be required.

8. The Court erred in instructing the jury as follows:

“It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its [727] value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of \$211,854.10. But should you find that plaintiff is entitled to recover you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate,

and that is always subject to control by the evidence in the case.

“If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.”

To the giving of which said instruction defendant *defendant* duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law, in this, that thereby the jury was instructed that it might allow damages against defendant, if in fact any damages were found by it to be recoverable, computed at the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale, even though he did not know that the corporations named, acting under his direction and control, had knowingly and willfully cut and converted the timber mentioned in the complaint, or any part thereof, and even though defendant did not know anything whatsoever about such cutting and conversion; and, further, that said instruction was erroneous as inapplicable to the evidence in the cause, there being no evidence whatsoever to show that defendant knew, or should have known, or had knowledge or notice, of the facts, or any of them, concerning the alleged cutting and conversion; and that there was no evidence whatsoever to justify the finding that defendant, in

the conversions complained of, acted willfully, maliciously, or was conscious of any wrong-doing on his part, and that thereunder defendant should not be held liable for damages based upon a [728] higher value of the timber converted than its stump-age value, to wit, the sum of one dollar (\$1.00) per thousand feet.

9. The Court erred in instructing the jury as follows:

“If you find that the defendant, or any of said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.”

To which said instruction defendant duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law and inapplicable to the case, inasmuch as under the pleadings the plaintiff alleged that the value of the timber alleged to have been converted while in place in the stump, did not exceed one dollar (\$1.00) per

thousand feet, and that plaintiff was thereby limited to such value as the basis for computing the value of the timber taken on the theory of an innocent trespass, and was, furthermore, inapplicable to the case, inasmuch as there was no evidence whatsoever as to what was the cost of manufacturing the timber into lumber, or what was the value added to said timber by reason of manufacturing the same into lumber, and that, therefore, there was no basis from which the jury could determine, under the instructions of the court, any other value of the timber converted than that based upon the value of the tree in place, namely, not to exceed one dollar (\$1.00) per thousand feet, board measure.

10. The Court erred in instructing the jury as follows:

“In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.” [729]

To which said instruction defendant duly excepted; and defendant avers that the giving of said instruction was erroneous, in that, so long a period of time had elapsed between the commission of the act or acts of conversion complained of and the bringing of said action, there being no adequate, or any, explanation, justification, or excuse for such delay; and, further, in that the Court failed to instruct the jury that its finding of the amount of interest, if any, should be separate and segregated from its finding as to damages, if any, exclusive of interest.

11. That the Court erred in giving any charge to



the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars (\$16,000.00).

12. That the Court erred in giving any charge to the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars (\$16,000.00), with interest thereon at the rate of seven per cent (7%) per annum from the time, or times, of the conversion, or conversions, until the close of the trial of said action.

13. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant.”

To the failure and refusal of the court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction VI.) And defendant specifies as several and separate grounds wherein the Court erred in failing and refusing to give said proposed instruction last mentioned, the following:  
[730]

(a) That there is no evidence whatsoever to justify a finding that any act of conversion was ever committed by any one.

(b) That there is no evidence to justify a finding that defendant is liable for any conversion that may have been established by the evidence.

(c) That there is no evidence to justify a finding that defendant personally directed, or participated

in, the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(d) That there is no evidence to justify a finding that defendant entered into a plan or conspiracy, or conspired, with any one to commit or cause to be committed the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(e) That there is no evidence to justify a finding that defendant aided or abetted in the commission of the acts of conversion, or any of them, which the jury may have found to have been committed.

(f) For that the uncontradicted evidence established that all of the timber alleged in the complaint, or proved upon the trial, as being cut down, felled, and removed, and manufactured into lumber and appropriated, used, sold and converted by defendant, or by any joint tort-feasor of defendant, or anyone for whose acts defendant is responsible, was cut and removed from the public timber lands of the United States by persons then citizens and residents of the state or territory of Montana, for agricultural, mining, manufacturing or domestic purposes, and was actually used for such purposes and not transported out of the said state or territory of Montana, and that at the time mentioned [731] in the complaint herein, there were no regulations made or prescribed by the Secretary of the Interior respecting said matter.

14. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find that the defendant never came into possession of the timber, and never purported to assume or assumed control over it, then your verdict must be for the defendant.”

To the failure and refusal of the court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction III.)

15. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders, liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction IV.)

16. The Court erred in failing and refusing to in-

struct the jury as requested by defendant as follows:

“If you find that any of the timber, for the conversion of which this action is brought, belonged to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them the purchase price which was received for such timber so converted was paid to any corporation [732] in which the defendant was a stockholder or officer, yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, nor does this constitute a conversion by defendant of the plaintiff’s property.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction V.)

17. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that conversion consists in an act of willful interference with any chattel without lawful justification, whereby the person entitled thereto is deprived of possession of it. The chattels for the conversion of which this action is brought consist of timber or lumber claimed to be owned by the United States, and if you find that the United States did own this timber, or lumber, yet, as matter of law, if the defendant in this case did not interfere with the possession of the United States in or to the timber



or lumber, for the conversion of which this action is brought, then your verdict must be for the defendant.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction VII.)

18. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“The burden of proof is on the plaintiff not only to establish by a preponderance of the evidence that timber has been unlawfully taken from the lands involved in this controversy, or from some portion thereof, but it is also incumbent upon the plaintiff to show, by a preponderance of the evidence, by whom the same was taken, and the quantity thereof, and I instruct you that, even if you should be satisfied from the evidence that timber had been unlawfully converted, and that the defendant was responsible therefor, nevertheless, if, from the evidence, you are unable to ascertain the quantity or extent of the timber taken, your verdict must be for the defendant, and, in this same connection, I instruct you that you are not permitted to guess at the quantity taken or to speculate as to the amount. You must, in such case, find a basis, in the preponderance of the evidence, for your computation in computing the amount of timber taken.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction IX.) [733]

19. The Court erred in failing and refusing to

instruct the jury as requested by defendant as follows:

“A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in section 22, township 14 north, range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and to keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, sale, or disposition. Even a knowledge upon A. B. Hammond’s part that Boyd was an employee of the corporation and was cutting timber for the corporation would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd’s cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd.”

To the failure and refusal of the Court to give said

instruction, defendant duly excepted. (Defendant's Proposed Instruction X.)

20. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

"If you believe from the evidence that Henry Hammond, during the period while the Edgar Claim was cut, was the sole owner of the Bonner Mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XI.)

21. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

"If you find from the evidence that timber was cut from Lot 10 in Section 18 by the Big Blackfoot Milling Company at [734] a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said tim-

ber. If he knew nothing of the taking thereof, and took no personal part therein, he would not be liable, although the corporation in which he was a stockholder and director would be liable.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction XII.)

22. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita Mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita Mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant’s Proposed Instruction XIII.)

23. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“If you find from the evidence that the Montana Improvement Company erected the Bonita Mill and sold the same to Fred A. Hammond, and that Fred A. Hammond in turn sold the same to George W.



Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant, A. B. Hammond, had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs, is a [735] question for the jury. But even if the Montana Improvement Company should be found by you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of the Montana Improvement Company or was an officer thereof. As already said to you, in the case of a corporation a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XIV.)

24. The Court erred in permitting the witness William Greene to answer the question as follows:

“From your experience as a scaler of timber, can you judge from what you observed on section 18 there, which portion of the section had been cut first?” by saying: “On the southeast quarter of these lots.” And in overruling defendant’s objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-A.)

25. The Court erred in permitting the witness William Green to answer the question as follows: “From your experience, can you tell the time that had elapsed between the first cutting and the second cutting?” by saying: “Well, in my judgment, it would be somewhere about five or six years.” And in overruling defendant’s objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-B.)

26. The Court erred in denying defendant’s motion to strike out the testimony of the witness William Greene and conclusions made by him concerning the amount of timber testified to by the witness as having been cut and taken from lands described in the complaint; upon the ground that such testimony and conclusions [736] were hearsay, irrelevant, incompetent and immaterial, and to which ruling of the Court defendant duly excepted. (Exception No. 1-C.)

27. The Court erred in permitting the witness, John M. Keith, to answer the question as follows: “And is it not also true that if the Missoula Mercantile Company had not carried Mr. Greenough he could not have carried on those operations?” by saying: “I think that is true of many of them in those days;

there were very few persons then who had any amount of means''; and in overruling defendant's objection thereto, upon the ground that it was incompetent, irrelevant and immaterial and not cross-examination. (Exception No. 2.)

28. The Court erred in overruling the question propounded by defendant to the witness, William H. Hammond, as follows: "At the time that you made this purchase, was it an out and out straight business transaction, whereby it was intended that the title, both legal and equitable, should pass to you, or was it intended and agreed among you that you should take title and hold it for some other concern, person or corporation?" defendant thereby intending to elicit, and would have elicited, from the said witness an answer to the effect that said transaction was an out and out straight business transaction and that it was intended that he should take the title, both legal and equitable, for his own use and benefit, and in sustaining plaintiff's objection to said question, upon the ground that it was leading and suggestive, and upon the further ground that the instrument speaks for itself as to what it is. (Exception No. 3.)

29. The Court erred in refusing to permit the document bearing date February 10, 1888, purporting to be a lease between the Blackfoot Milling and Manufacturing Company, as lessor, and [737] William H. Hammond, as lessee, to be offered in evidence, defendant offering said document as the document under which the said William H. Hammond took possession of the leased premises, and in sustaining plaintiff's objection thereto for the reason

that the document does not bear on its face any authority from the Blackfoot Milling and Manufacturing Company for its execution; that it is merely signed by the president; that it is not acknowledged before a notary public and that it is an instrument affecting the right of possession to real property for more than one year; that there is nothing to show that it is the instrument that it purports on its face to be; in other words, the instrument purporting to be executed by the Blackfoot Milling and Manufacturing Company does not bear the seal of that Company. (Exception No. 4.)

30. The Court erred in refusing to allow the witness, William H. Hammond, to answer the following question: "I now ask you to state from your recollection, what the terms of the instrument were that you had a duplicate of, that purported to be a lease?" defendant arguing that it was the document under which the said William H. Hammond took possession of the Bonner Mill, and further contending that it went to the question of his good faith in everything he did, and in sustaining the objection of plaintiff to the question, for the reason that the instrument itself would be the best evidence of its terms. (Exception No. 5.)

31. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question as follows: "While you were operating the property under that lease that you have testified to, state how much rental you paid," for the purpose of showing the *bona fides* of the transaction, and in sustaining the objection of the plaintiff to said question, on the



[738] ground that the lease itself should be the best evidence of the amount of rental that was to be paid. (Exception No. 6.)

32. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "To whom did you pay rental?" which, had the witness been permitted to answer same, he would have stated that he paid rental therefor to the lessor, Blackfoot Milling and Manufacturing Company, thereby tending to establish the *bona fides* of the transaction under which he became and continued to be lessee of said property, and in sustaining the objection of plaintiff to said question on the ground that the lease itself should be the evidence of the person to whom the rental was paid. (Exception No. 7.)

33. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "Was there any provision of any kind for the extension of the original lease which you have mentioned?" defendant thereby intending to show, and the said witness would have stated, that there was such provision and that such provision was inserted as part of the consideration moving to him for his transfer to the said Blackfoot Milling and Manufacturing Company of the said property which he had theretofore owned in severalty and absolutely, and thereby evidence would have been furnished tending to establish the original *bona fide*, absolute and several ownership of the said witness of said property and of the *bona fide* character of the transfer by him of said property to said Black-

foot Milling and Manufacturing Company and of the lease that was made to him by said Company, and in sustaining the objection interposed by plaintiff to said question, on the ground that it called for the giving of the provisions of the [739] lease. (Exception No. 8.)

34. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question propounded to him by defendant as follows: "Mr. Hammond, state whether or not while engaged in the logging business in the State of Washington you obtained credit from any mercantile concern?" defendant thereby intending to, and would have, elicited from the witness an answer to the effect that he had obtained such credit, and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 12.)

35. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question propounded to him by defendant as follows: "State whether or not while in business in Washington it was your custom to give orders upon any mercantile house in payment of your men," by which question it was intended to elicit the fact that it was, and that, therefore, there was nothing sinister in the following of the same practice at a later date, as indicating any undue or other relationship than that of debtor and creditor between defendant or the Missoula Mercantile Company, on the one hand, the said witness, on the other; and in sustaining plaintiff's objection

to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 13.)

36. The Court erred in denying the admission in evidence of those two certain affidavits, dated November 21, 1885, and purporting to have been made by H. A. Ameraux and William H. [740] Smith, which the witness, G. W. Fenwick, identified as having been seen by him before he made his purchase of the Bonita Mill; each of the said affidavits, in substance, sets forth that affiant was familiar with the country lying along the line of the Northern Pacific Railroad between the Town of Missoula and the Town of Bearmouth, in the Territory of Montana; and that he was enabled to testify understandingly with regard thereto; that said land was mineral in character and not subject to entry under existing laws of the United States as agricultural land, and that to his certain knowledge there were many mineral locations, leads, lodes and ledges bearing gold, silver and other precious metals; and that within said limits and near said railroad there was an organized mining district, in which were a number of mines then being worked for precious metals; and that said country and lands were essentially mineral land and unfit for agricultural lands, and were not chiefly valuable for the timber thereon; defendant thereby intending to show the good faith, and basis for the good faith, of the said G. W. Fenwick in his belief that the lands upon which he cut timber were mineral lands, upon which he might rightfully cut timber.

under the provisions of the Act of Congress of June 3, 1878; and in sustaining the objection of the plaintiff to the admission in evidence of said affidavits, for the reason that they were, and each of them was, wholly irrelevant, incompetent and immaterial, and on the further ground that each is an *ex parte* affidavit and an attempt to introduce evidence as to the mineral character of the lands in question under conditions when the plaintiff in this case has had no opportunity to examine or cross-examine the witness testifying as to the mineral character of the land. (Exception No. 13-A.) [741]

37. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question put to him by defendant as follows: "What acts, if any, of management of the Bonita Mill property on the Hellgate, did Mr. A. B. Hammond exercise during the time that you have testified to, from your purchase in 1886 until the time that you gave up the mill?" defendant thereby intending to elicit from the witness, and the witness would have testified, that the said A. B. Hammond did not exercise any acts whatsoever of such management at any time; and in sustaining the objection of plaintiff to said question, on the ground that it called for the conclusion of the witness. (Exception No. 14.)

38. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question propounded to him by defendant as follows: "State whether or not demand was ever made upon you by any officer of the federal Government for an inspection of your books or records at any time during the



time that you were operating this property," by which it was intended to elicit, and the said witness would have testified, that no such demand had been made; and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial. (Exception No. 15.)

39. The Court erred in requiring the defendant, A. B. Hammond, as a witness, to answer the question propounded, upon cross-examination, by plaintiff to him, as follows: "How much did you ultimately realize from the sale of your interest in the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company, the Montana Improvement Company and the Missoula Mercantile Company?" by saying: "Well, so far as the Montana Improvement Company is concerned, I came out [742] at the little end of the horn. I never got anything out of it. I lost what I put in. The Blackfoot Milling and Manufacturing Company was a transfer of stock. I received stock in the Big Blackfoot Milling Company; that was really in effect a transfer of the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, and I received stock in that transfer; and in overruling defendant's objection to said question, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 16.)

40. The Court erred in requiring the defendant,

A. B. Hammond, as a witness upon cross-examination, to answer the question propounded to him by plaintiff, as follows: "From the Big Blackfoot Milling Company, how much did you ultimately receive out of it?" by saying: "I got my *pro rata* out of the sale of the Big Blackfoot Milling Company. I could not say off-hand what it amounted to, but I think it was as much as my brother got"; and in overruling defendant's objection to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 17.)

41. The Court erred in requiring the defendant, A. B. Hammond, as a witness upon cross-examination, to answer the question as follows: "What was the value of your stock when [743] you transferred your interest in the Missoula Mercantile Company?" by saying: "That is a matter of opinion. It did not increase very much. I got six per cent dividends on my stock in the Missoula Mercantile Company. I took stock in another corporation"; and in overruling the objection of defendant to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 18.)

42. The Court erred in requiring the defendant,

A. B. Hammond, as a witness, upon cross-examination, to answer the following question: "What is your estimate of its value (the value of the holdings of shares of stock by witness in the Missoula Mercantile Company) at the time of your disposition of it?" by saying: "I do not consider that it depreciated any. It was worth as much as it was originally worth, if not more"; and in overruling the objection of defendant to said question, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 19.)

43. The Court erred in requiring the defendant, A. B. Hammond, as a witness, upon cross-examination, to answer the question as follows: "Can't you give it to me in dollars and cents so we can get it into the record?" by saying: "I should judge it was worth at least two hundred and fifty or three hundred thousand dollars"; and in overruling the objection of defendant [744] to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 20.)

44. The Court erred in permitting the witness, George B. Archibald, to answer the question as follows: "You may state the examination you made of



each section separately and what you found upon it and your conclusions as to the mineral or nonmineral character of the ground," by saying: "Starting in with section 10, township 11 north, range 16 west, as to the north half of the northwest quarter and the northwest quarter of the northeast quarter, I found that most all of those three forties were sandstone, with a little lime in the extreme northeast quarter, and there was no excavation of any nature there, absolutely nothing to indicate the land having any value for mineral purposes. The formation dipped to the southwest, and as I said, there was no excavation of any kind, nor anything to indicate the mineral character. The sandstone is not mineralized. Then take the south half of the southeast quarter of section 10 and the northeast quarter of the southeast quarter of section 10, the same township and range, I found that the northeast quarter of the southeast quarter was entirely underlain with sandstone, and in the southeast quarter of the southeast quarter, practically the whole forty was covered with diabase. Diabase is an igneous rock, consisting of plagioclase and feldspar. It may contain minerals. That rock in this particular place did not contain minerals. In the other forty, that was underlain mostly with valley alluvium, and the formation [745] in places does not show for that reason"; and in overruling the objection of defendant interposed to said question, upon the ground that it was irrelevant, incompetent and immaterial and not rebuttal. (Exception No. 21.)

45. The Court erred in permitting the witness,



George B. Archibald, to answer the question as follows: "I wish you would state whether or not you found any minerals, or whether the rock is of such a character as usually bears minerals?" by saying: "The only possible place in any of this ground that I have described, was over in section 10 where I would expect to find any mineral and that would be in the diabase. For that reason, we examined that very thoroughly and found several broken, fractured zones. I went so far as to have assays made of that rock and got absolutely nothing from it"; and in overruling the objection of defendant interposed to said question, upon each and all of the ground as stated and set forth in the last assignment of error herein, to wit, assignment 44. (Exception 22.)

46. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indications of mineral on said section 14?" by saying: "I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 27.)

47. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral on section 12, township 11 north, range 16 west?" by saying: "On the southwest quarter of the southwest quarter, there was a fractured zone there in [746] igneous material that showed iron stains, but I do not believe it would be considered mineral in character"; and in overruling the objection of defendant interposed

to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 29).

48. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral in section 8, township 11 north, range 15 west?" by saying: "No, sir, I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 30.)

49. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you examine section 18, township 11 north, range 15 west?" by saying: "I did, and saw nothing there to indicate that it was mineral in character"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 31.)

50. The Court erred in granting the motion of plaintiff to amend the complaint on file herein on its face, by adding to the last line of the prayer of said complaint: "And for interest thereon"; and in overruling the objection made by defendant to the allowance of such amendment. (Exception No. 39.)

51. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1891, marked "Plaintiff's Exhibit No. 5," over the objection of defendant that the same was incompe-

tent, irrelevant, immaterial, hearsay and *res inter alios acta*, and [747] from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to said Missoula Mercantile Company. (Exception No. 01-A.)

52. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1892, marked "Plaintiff's Exhibit No. 6," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block and also the Hammond Block, were assessed to Missoula Mercantile Company. (Exception No. 01-B.)

53. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1893, marked "Plaintiff's Exhibit No. 7," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to Missoula Mercantile Com-

pany. (Exception No. 01-C.)

54. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1894, marked "Plaintiff's Exhibit No. 8," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and [748] from which it appeared that the said Bonner Mill property, the Florence Hotel and Eddy Block, Eddy residence, E. L. Bonner residence, "W. H. Hammond residence \$2500 and "W. H. Hammond, Levasseur house \$400" were assessed to the Missoula Mercantile Company. (Exception No. 01-D.)

55. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1890, marked "Plaintiff's Exhibit No. 9," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that 6,750,000 feet of lumber and 4,000,000 feet of logs were assessed to Missoula Mercantile Company, and that the Florence Hotel and Eddy Block were assessed to Missoula Mercantile Company. (Exception No. 01-E.)

56. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the



year 1890, marked "Plaintiff's Exhibit No. 10," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Fowler Mill, the Tyler Mill, the McClain Mill and the Silver Thorn Mill and outfit, were assessed to Missoula Mercantile Company. (Exception No. 01-F.)

57. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of the Missoula Mercantile Company for the year 1895, marked "Plaintiff's Exhibit No. 11," over the objection of defendant that the same was incompetent, [749] irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Hammond Block, Florence Hotel and Eddy Block, and Eddy residence; also "W. H. Hammond residence \$2500" and "W. H. Hammond, Levasseur house \$400," were assessed to Missoula Mercantile Company. (Exception No. 01-G.)

58. The clerk of the court and the Court erred in taxing and the Court erred in confirming the taxation of costs herein made by the clerk in this, that the mileage, amounting in all to the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), of seven certain witnesses coming from without the Northern District of California, was computed upon

the mileage actually and necessarily traveled by said witnesses within said District, whereas the proper mode of computation was to allow *to* to exceed one hundred miles going and returning for each witness, that is to say, not to exceed ten dollars (\$10) for each of said witnesses, which would amount in the aggregate to the sum of seventy dollars (\$70), thereby decreasing the amount of said item in the sum of one hundred eight and 30/100 dollars (\$108.30).

WHEREFORE, defendant prays that the said judgment may be reversed and that a new trial be granted.

A. B. HAMMOND,  
By CHAS. S. WHEELER,  
And W. S. BURNETT,

His Attorneys.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [750]

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*In the District Court of the United States in and for  
the Northern District of California, Division  
No. 2.*

No. 15,130.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, A. B. Hammond, as principal, and Mary P. Fenwick and William H. Hammond, as sureties, are held and firmly bound unto plaintiff in the above-entitled action in the sum of Seventy-five Thousand (\$75,000.00) Dollars, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, representatives, executors, administrators and assigns, firmly by these presents:

Sealed with our seals and dated this 25th day of September, 1914.

WHEREAS, the above-named defendant, A. B. Hammond, has sued out a Writ of Error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action, in favor of the plaintiff therein and against the defendant therein, for the sum of Fifty-one Thousand and Forty (\$51,040.00) Dollars, interest and costs;

NOW, THEREFORE, the condition of this obligation is such, that if the above-named A. B. Hammond shall prosecute such Writ of Error to effect, and answer all damages and costs, if he shall fail to make good said plea, then this obligation shall be void; [751] otherwise to remain in full force and virtue.

A. B. HAMMOND.

WILLIAM H. HAMMOND.

MARY P. FENWICK.

Approved this 25th day of September, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Sep. 25, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [752]

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**[Certificate of Clerk U. S. District Court to Tran-  
script of Record.]**

*In the District Court of the United States, in and for  
the Northern District of California.*

No. 15,130.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. B. HAMMOND,

Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States of America in and for the Northern District of California, do hereby certify the foregoing seven hundred and fifty-two (752) pages, numbered from 1 to 752, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that the cost of the foregoing return to Writ of Error is \$469.20; that said amount was paid by the defendant, and that the original Writ of Error and Citation issued in said cause are hereto annexed.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 23d day of October, A. D. 1914.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk. [753]

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**[Writ of Error (Original).]**

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the District Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between A. B. HAMMOND, plaintiff in error, and the UNITED STATES OF AMERICA, defendant in error, a manifest error hath happened to the great damage of the said A. B. HAMMOND, plaintiff in error, as by his complaint appears.

WE, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City

of San Francisco, in the State of California, on the 24th day of October, 1914, next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, the 25th day of September [754] in the year of our Lord one thousand nine hundred and fourteen.

[Seal] WALTER B. MALING,  
Clerk of the District Court of the United States, for  
the Ninth Circuit, Northern District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by  
WM. C. VAN FLEET,  
Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 25th day of September, 1914.

FRANK HALL,  
JNO. W. PRESTON,  
Attorneys for Plaintiff. [755]

[Endorsed]: No. 15,130. United States District Court, Northern District of California. United States of America vs. A. B. Hammond. Writ of

Error. Filed September 25, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**[Answer to Writ of Error.]**

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [756]

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**[Citation on Writ of Error (Original).]**

UNITED STATES OF AMERICA—ss.

The President of the United States to the United States of America, Greeting:

YOUR ARE HEREBY cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Northern District of California, wherein A. B. HAMMOND is

plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, this 25th day of September, 1914.

WM. C. VAN FLEET,  
United States District Judge.

SERVICE of the within citation and receipt of a copy thereof is hereby admitted this 25th day of September, 1914.

FRANK HALL,  
JNO. W. PRESTON,  
Attorneys for Plaintiff. [757]

[Endorsed]: No. 15,130. United States District Court, Northern District of California. United States of America vs. A. B. Hammond. Citation. Filed September 25, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.



[Endorsed]: No. 2503. United States Circuit Court of Appeals for the Ninth Circuit. A. B. Hammond, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed October 23, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

No. 2503

IN THE

2  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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A. B. HAMMOND,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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**BRIEF FOR PLAINTIFF IN ERROR.**

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**PART ONE**

Comprising

**STATEMENT OF THE CASE,  
ASSIGNMENT OF ERRORS,  
REVIEW OF THE EVIDENCE.**

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CHAS. S. WHEELER,

W. S. BURNETT,

*Attorneys for Plaintiff in Error.*

---

*Filed this*.....*day of November, 1915.*

**FRANK D. MONCKTON, Clerk.**

*By*.....*Deputy Clerk.*



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No. 2503

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

### PART ONE

Comprising

STATEMENT OF THE CASE,

ASSIGNMENT OF ERRORS,

REVIEW OF THE EVIDENCE.

*See Index Preceding*  
Statement of the Case.

This action was brought in the Circuit Court of the United States, Ninth Circuit, Northern District of California, in June, 1910, by the United States against A. B. Hammond, as sole defendant, a citizen of the State of California and resident of the Northern District thereof, to recover as damages the sum of \$211,854.10, alleged in the complaint to be the value of 21,185.410



feet of lumber at the rate of \$10.00 per thousand feet, manufactured from timber cut upon the public lands of the United States in Montana. As standing timber its value is alleged to be \$1.00 per thousand feet, or \$21,-185.41, and after being felled and prepared for sawing into lumber, at the rate of \$5.00 per thousand feet, or \$105,927.05.

As will hereafter appear, the United States prevailed in the action and the cause is now before this Court by writ of error sued out by A. B. Hammond, the defendant in the lower Court. Hereafter for the sake of convenience we shall designate A. B. Hammond as defendant, and the United States as plaintiff.

Two separate bodies of land are involved, one lying upon the water shed of the Big Blackfoot River (these being located in Townships 13 and 14 North, Range 14 West and Township 14 North, Range 15 West and Township 14 North, Range 16 West, all of the Montana Meridian)—the other lying upon the water shed of the Hell Gate River (these being situated in Township 11 North, Range 15 West and Township 11 North, Range 16 West, Montana Meridian). Between the two bodies of land arise great mountains. The nearest point between the two cannot well be less than fifteen miles apart in an air line. The timber cut on the Blackfoot which is charged against defendant was driven down the Blackfoot River and manufactured into lumber at Bonner, which is situated just above the confluence of the Blackfoot with the Hell Gate River, some eleven miles east of the town of Missoula. This mill was operated in turn by Henry Hammond, also known as W. H.

Hammond, a brother of the defendant, first under his personal ownership and later as lessee of Blackfoot Milling & Manufacturing Company and still later was owned and operated by Big Blackfoot Milling Company. The timber cut on the Hell Gate which is charged against defendant was hauled by team or sled to a mill situated at Bonita on the Hell Gate River, some fourteen miles above the confluence of the Blackfoot and Hell Gate Rivers and twenty-five miles from the town of Missoula. This mill was originally owned by Montana Improvement Company, Ltd.; by that company installed for, and owned and operated for a few months by Fred Hammond, a brother of defendant, and finally by George W. Fenwick, a brother-in-law of defendant.

It is alleged that this appropriation of plaintiff's property occurred between January 1, 1885, and January 1, 1895, a period anterior to the bringing of the action of from fifteen to twenty-five years; but other particulars concerning the time or place or the amount claimed to have been taken from the several subdivisions of land are not given in the complaint. Furthermore it is alleged in the complaint that in the commission of this conversion defendant did not do so individually, but "as the general manager of and directing all of the business of" two certain corporations, now dead, respectively known as "The Montana Improvement Company, Ltd.," and "The Blackfoot Milling and Manufacturing Company": also that it was in pursuance of a plan between these corporations and defendant. Here it may be added that on the calling of the cause for trial the complaint

was amended so as to add yet two other corporations as whose general manager defendant, it was alleged, had committed the conversion, namely, "Missoula Mercantile Company" and "Big Blackfoot Milling Company" (Tr. p. 61).

To the complaint an amended demurrer (Tr. p. 17) was interposed which was overruled (Tr. p. 28) and that ruling is assigned as error (A. of E. No. 1; Tr. p. 794) and is here for review.

The complaint being unverified issue was joined by an amended answer (Tr. p. 41) containing a general denial (Tr. p. 42). The answer also set up a number of special defenses. As to the Hell Gate Lands it is averred that they were "mineral lands" and not subject to entry under the then existing laws of the United States, except for mineral entry and that any timber cut therefrom was lawfully taken in pursuance of the Act of June 3, 1878, 20 Stat. at large, p. 88, Chap. 150, and in compliance with the lawful rules and regulations prescribed from time to time by the Secretary of the Interior (Ans. par. 1, Tr. p. 42). Furthermore, it was averred (Ans. par. 2, Tr. p. 43) that said Hell Gate lands constituted "mineral lands not subject to entry under existing laws of the United States, except for mineral entry" as such term was then understood and construed by the Secretary of the Interior and the Federal Courts and that any timber cut therefrom was taken in pursuance of said Act of June 3, 1878, and defendant further pleaded the provisions of Section 8 of the Act of March 3, 1891, Chap. 561, 26 Stats. at large, p. 1099, and the Act of March 3, 1891, Chap. 559,

26 Stats. at large, p. 1093, as a defense. The two acts of March 3, 1891, last mentioned are also pleaded as a defense to timber cut from the Blackfoot as well as the Hell Gate (unassociated with the Act of June 3, 1878) by paragraph 5 of the answer (Tr. p. 53).

The Hell Gate and Blackfoot countries were very different as regards the status of the United States as proprietor. The Hell Gate with but a trifling exception constituted unsurveyed public lands during the period mentioned in the complaint, but not so with the Blackfoot. Hence as to the latter territory the controversy largely resolved itself into the question as to whether or not timber had been cut, for the cutting of which defendant was responsible, from the respective tracts of land, prior or subsequent to the acquisition by settlers and purchasers of such lands, it being conceded by the Government that after the date of settlement and filing the application to enter or purchase same under the public land laws of the United States, it had no property right in the timber growing thereon. So, virtually, each quarter section of the Blackfoot resolved itself into a separate controversy and by stipulation (Tr. p. 743) the date prior to which, as to each quarter section, the Government must prove the cutting to have taken place, was established.

There were two specific tracts of land in the Blackfoot territory, the defense as to which rested on a different basis, namely, Lots Numbers 9 and 10 in the South half of Section 18-14-15, containing respectively 45.32 and 45.43 acres, from which the Government claimed 161,340 feet and 193,390 feet had been converted. Paragraph 3



of the answer sets forth (Tr. p. 45) the defense in relation thereto, from which it appears that "Lot No. 9 was logged by Big Blackfoot Milling Company under a permit issued to the Company by the Secretary of the Interior under the said Act of Congress, approved March 3, 1891, entitled 'An Act to Amend Section 8 of an Act Approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes," ' ' and that Lot Number 10 was in part logged by said Company under the mistaken belief that it was included within said permit.

The other tract which furnished a legal defense peculiar to itself was the "Edgar Claim"—Answer par. 4 (Tr. p. 49), embracing 160 acres, from which the Government claimed 1,315,000 feet had been taken some thirty years ago—Edgar, as claimed by the defendant, having in large part cut same in clearing off his claim for settlement purposes and finally being forced to abandon it because his citizenship papers were destroyed by fire (Tr. pp. 415-416). See letter from General Land Office (Tr. p. 446).

Common alike to the Blackfoot and Hell Gate tracts of land was the consideration that each lay within the forty-mile limit of the Northern Pacific Railroad grant which conferred upon the railroad the ownership of the odd numbered sections and in Hell Gate Valley, more particularly, large quantities of timber had at an earlier date been lawfully cut from the lands involved in this action for the construction of said railroad which ran through the Hell Gate Valley.

With the issues thus joined trial before a jury commenced on January 14, 1913. During the course of the trial and after defendant had at great expense prepared his defense by the taking of depositions relative thereto, plaintiff eliminated certain specified tracts of land in the Blackfoot from which it was alleged defendant had converted timber. The lands so eliminated were as follows:

1. In Section 22-14-14 land known as the Sontag, and two Silvey claims, amounting in all to 400 acres, leaving in said section 80 acres, constituting the East half of the North East quarter thereof, which for convenience will hereafter be designated as the "Boyd Trespass" (Tr. p. 71).

2. The Smith Davis claim of 160 acres, constituting the South East quarter of Section 8-14-14 (Tr. p. 81).

3. The North West quarter of Section 2-14-14, constituting 160 acres, as to which it was admitted no timber had ever been cut thereon (Tr. p. 81). Thus of the 2080 acres charged against defendant plaintiff abandoned 680 acres, or 30% of its claim. While the amount charged in the complaint was 21,185,410 feet, plaintiff admitted (Tr. p. 746) that after the introduction of all the evidence in the case and making allowance for eliminations noted its claim against defendant was 16,000,000 feet. The testimony of the Government estimators attributed approximately one-half of the timber cut to the Hell Gate and the other half to the Blackfoot.

The complaint did not pray for the recovery of interest, but upon the close of all the testimony, over the

objection of defendant (Exception No. 39, Tr. p. 746) plaintiff was permitted to amend its complaint by adding to the last line of the prayer the words “and for interest thereon”, which ruling is assigned as error (A. of E. 39, Tr. p. 831) and as to the substantive law involved therein will be considered in conjunction with instructions on the subject which the Court gave the jury.

The trial lasted from January 14 until February 8, 1913—there being fifteen trial days—when the jury returned a verdict against defendant in the sum of \$51,040.00. Costs were thereafter taxed at the sum of \$1617.49. It is here urged, supported by bill of exceptions to the order taxing costs (Tr. p. 788) and assigned as error (A. of E. 58; Tr. p. 834) that the amount at which the costs were taxed is excessive in the sum of \$108.30 through the adoption of an erroneous method in the computation of the mileage of witnesses coming from without the district.

Over the objection and exception of defendant (Tr. pp. 770, 776, 780), which is here assigned as error (A. of E. 10, Tr. p. 809), the Court instructed the jury that in fixing the amount of any verdict interest should be included on the value of any lumber so converted from the date of such conversion to the present time. The Court also, over the objection and exception of defendant, instructed the jury what constituted the measure of damages from the respective view points of innocent and willful trespass (Tr. pp. 769-70; p. 780), which instructions are here assigned as error (A. of E. 8 and 9, Tr. pp. 806-9).

The jury returned a verdict in the lump sum of \$51,040.00.

It was obviously arrived at by the following method of calculation:

They placed the stumpage value at \$1.00 per thousand feet.

16,000,000 feet at \$1.00 per thousand.....	\$16,000.00
They took \$1.00 per thousand feet as profit.....	16,000.00
They allowed interest from 1895 to 1912—17 years at 7%—equal to 119% on the stump- age value .....	19,040.00

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Making a total of.....\$51,040.00

In due time defendant moved for a new trial and among other things contended that there was no liability whatever on the part of defendant and that if this were not so, then the only proper measure of damages under the circumstances of the case was the stumpage value in the tree, which did not exceed \$1.00 per thousand feet and that it was error to have directed the jury to award interest. Defendant suggested that if on other grounds the motion for a new trial was not granted that it at least should be conditionally granted, that is to say, in effect that the Court should order a new trial unless plaintiff within a reasonable time consented to the modification of the judgment entered upon the verdict from \$51,040 to \$16,000.

The learned trial Court denied the motion for a new trial and in so doing handed down an opinion on Sep-



tember 25, 1914, which is made an appendix to this brief, as it has not been published in the Federal Reporter.

As will be seen, the burden of the opinion is to the effect that the defendant's exceptions to these instructions were not sufficiently specific and that the Court was not informed of the several aspects in which it could be claimed, or, in fact, was claimed, that the instructions were erroneous.

As to the instructions concerning the measure of damages the trial Court said:

“If we may regard the exception as sufficient in substance to enable the Court to consider the objections urged upon their merits I think it will be found that the charge in the respect involved is fully in harmony with approved principles applicable to cases of this character.”

As a practical matter, therefore, it would seem that said charge would have been given regardless of the form of plaintiff's exception. The trial Court, therefore, cannot be said to have been led into error because of any misconception of defendant's exception to the law as laid down in the instruction.

The instruction directing the jury to award interest, was clearly erroneous as we shall hereafter demonstrate. Nevertheless the learned trial Court considered the ruling contained in this instruction as “the generally prevailing one”.

We know, however, that the jury awarded interest in the sum of \$19,040.00, and if this was error, the precise effect of that error is demonstrable in dollars and cents.

Why should that error not be corrected? Why at least should not the judgment be reduced by that sum?

The appellate Courts of the United States have been careful to place the honor of the Government upon a high standard. They have not permitted the Government to take advantage of the mere errors or technical oversights of its citizens in order to enrich itself at the unjust expense of the citizen. Thus, in a recent case the Circuit Court of Appeals for the Fifth Circuit, in a timber trespass case, struck an item of interest from a judgment although no exception had been taken and no error assigned.

White v. United States, 202 Fed. 501; 121 C. C. A., 33.

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On this hearing the main questions to be considered by the Court relate to the said instructions concerning the measure of damages and interest and those features in the case which we contend required the Court to instruct the jury to find a verdict for defendant, which the Court failed to do (Defendant's Proposed Instruction No. 6, Tr. p. 749; A. of E. 13, Tr. pp. 810-811).

Prominent in this connection will be the consideration as to whether or not there was any proof sufficient to connect defendant with any conversions which may have been established. In this behalf also the failure of the Court to give to the jury defendant's proposed instructions which more clearly define the circumstances under which one not personally and physically committing a

conversion might nevertheless be held liable therefor will be considered, as we maintain in this respect the jury was not sufficiently instructed (Defendant's Proposed Instructions 3, 4, 5, 7, 10, 11, 12, 13 and 14, Tr. pp. 747 et seq.; A. of E. 14, 15, 16, 17, 19, 20, 21, 22, 23, Tr. 811).

The Court instructed the jury over the objection of defendant (Tr. pp. 779-80) that if the manner of the taking of the timber was such as to enhance plaintiff's difficulty in establishing the exact extent of the damage, the proof need not be of that precise exactitude which would be required under other circumstances. This was assigned as error (A. of E. 7; Tr. pp. 804-805) as is also (A. of E. 18, Tr. p. 814) the failure of the Court to give defendant's proposed instruction concerning the burden of proof which, of course, also bears on the subject last mentioned (Defendant's Instruction 9, Tr. p. 749).

An instruction concerning the Mineral Land Act of June 3, 1878, excepted to by defendant (Tr. p. 777), which is assigned as error (A. of E. 4, Tr. p. 795) as well as an instruction peculiar to the Edgar Claim and excepted to by defendant (Tr. p. 779, A. of E. 5, Tr. p. 880), will also be reviewed.

Other errors hereafter to be considered have been already noted in this statement of the case and in addition we claim there was prejudicial error committed in the rejection and admission of certain testimony and evidence (A. of E. 24-49 inc. and 51 to 57 inc., Tr. pp. 818 et seq.).

We think all the questions to be discussed will be more readily understood and a general view of the case before this Court best obtained if for our first point we take up the lack of evidence to connect the defendant with any conversion which may have been established by the proof.

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### **Specification of Errors.**

1. The Court erred in overruling the demurrer of defendant to the complaint herein.

2. The reading to the jury after it had retired to deliberate upon its verdict, of the direct testimony, or part of the direct testimony, of a witness called on behalf of the plaintiff, namely, Thomas G. Hathaway, and at the same time denying to the defendant the right to read to the jury at said time testimony given by said witness on cross-examination, which testimony last mentioned contradicted in many important particulars the testimony given by said witness on direct examination, and which said testimony last mentioned was so reread to the jury, upon the ground that thereby an irregularity was committed in the proceedings of the Court and jury, and an abuse of discretion on the part of the Court, by which the defendant was prevented from having a fair trial, and in overruling defendant's objection thereto (Exception No. 40).

3. The failure of the jury to state how much, if any, of the verdict of fifty-one thousand and forty dollars (\$51,040) brought in by it against defendant, was composed of interest, the Court having instructed the jury



that in fixing the amount of any verdict it might find for the plaintiff, the jury should include interest at the rate of seven per cent (7%) per annum on the value of any lumber converted from the date of such conversion to the present time, which defendant specifies as misconduct of the jury.

4. The Court erred in instructing the jury as follows:

“The defendant pleads in justification of the cutting and conversion of part of the timber in question the right so to do under the act of June 3d, 1878. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain states and territories, to cut for building, agricultural, mining or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in the state or territory of which the parties cutting are residents.

“The word ‘residents’ as herein used includes domestic corporations, that is, corporations organized and existing by virtue of the laws of the State or territory wherein they are cutting and removing timber from the public domain.

“This authority is given subject to regulations authorized to be made by the Secretary of the Interior, for the protection of the remaining timber and undergrowth. Pursuant to the authority thus conferred, the Secretary of the Interior, on August 5, 1886, prescribed, among others, the following regulation:

“ ‘Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this Act shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions, if surveyed, and as near as practicable

if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining or other domestic purposes within the State or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid. (5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department. (6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or territory where it grew.'

"The regulation just quoted is a lawful and reasonable one and imposes upon a person or corporation engaged, after its promulgation, in conducting a sawmill, or engaged to a considerable extent in such cutting, or who makes a business of cutting timber on mineral lands and selling it to keep the record prescribed above; and without the observance of which such cutting cannot legally be done. In this case defendant has offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the Statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by

defendant and admitted, touching the character of the land along the Hellgate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

“In this connection and as bearing on the question of such good faith, you will understand that the phrase ‘said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry,’ as used in the Act of June 3d, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and to the persons cutting. If the land in question is worth more for agricultural purposes than mining it is not mineral land within the meaning of the Act, although it may contain some measure of gold or silver or other valuable minerals. This is also true of timber lands. If the lands along the Hellgate River from which a portion of the timber in question was cut were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the Act of June 3d, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land, it is taken at the peril of being held responsible therefor.”

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the rules and regulations of the Secretary of the Interior, referred to therein, were, or that any of them was, lawful or reasonable.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it in effect instructed the jury that such rules applied to one operating under appointment or agency for another person, as was George W. Fenwick.

To which portion of said instruction defendant duly excepted.

(c) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that defendant had offered no evidence tending to show a compliance with said Rules and Regulations, and instructing the jury that for that reason defendant had failed to bring himself within the protection of the said Statute of 1878, and that defendant was not relieved of liability for any timber so cut since said Regulation was adopted, by reason of the fact that said lands might have been in fact mineral in character.

To which portion of said instruction defendant duly excepted.

(d) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it



instructed the jury as to the meaning of the words, "Mineral Lands", as used in the Act of June 3d, 1878, and particularly in that portion of the instruction wherein it stated that if the lands along the Hellgate River, from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and that neither defendant nor corporations named had a right to cut timber from such lands under the Act of June 3d, 1878.

To which portion of said instruction defendant duly excepted.

5. The Court erred in instructing the jury as follows:

"The defendant seeks also to justify the cutting and removing of the timber from the S. E.  $\frac{1}{4}$  of Section 28, Township 14 North, Range 14 West, by reason of the fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a willful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him,

acting under his direction and control, cut and converted the timber in question from the S. E.  $\frac{1}{4}$  of said Section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold.”

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements, is in law a willful trespasser, without regard to the question of his good faith in making the entry.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that if defendant was liable for all or any part of the timber cut and removed from the so-called Edgar Claim, then that he was liable for the full value of the timber so cut and carried away at the time it was sold, in that thereby the Court took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

6. The Court erred in instructing the jury as follows:

“The defendant further sets up in his answer that the cutting and removing of the timber from the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of Section 18, Township 14 North, Range 15 West, was authorized by a permit issued by the Secretary of the Interior on January 16, 1892, to the Blackfoot Milling & Manufacturing Company under and by virtue of the provisions of the Act of March 3, 1891, which permit was afterwards transferred to the Big Blackfoot Milling Company. The permit so issued was made subject to certain conditions, restrictions and limitations therein set forth and which have been read to you. The Act provides that the Secretary of the Interior may designate the sections or tracts of land and prescribe the conditions, limitations and restrictions under which the cutting shall be carried on. In this instance, as stated, the Secretary of the Interior did prescribe the conditions, restrictions and limitations under which said corporations could cut timber from the lands last above described by inserting them in the permit itself. These conditions, restrictions and limitations were reasonable, and it was the duty of those acting under such permit to comply therewith. If you find that the said corporations named, acting under and through the direction and control of the defendant, cut and removed the timber from the lands last described without complying with the conditions, restrictions and limitations embodied in said permit, then neither they nor the defendant acquired any right whatsoever in and to the timber so cut and removed, but such cutting was a trespass and the plaintiff is entitled to recover for the value of such timber if converted as alleged. Moreover, it was the duty of those cutting under said permit to know and ascertain the lines bounding the land from which they were entitled to cut timber thereunder, and the fact that they may have misapprehended their rights under such permit will not justify a cutting outside such lines, nor will it mitigate the damages resulting

therefrom. In other words, although the jury may find that defendant or those under his direction cut outside of the lands included in such permit under the mistaken belief that the permit included the lands from which they did cut, they would in law, as to the lands outside of this permit, be trespassers and liable to the plaintiff for the value of any timber so cut."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the burden of proof rested upon the defendant to establish that the cutting and removal of the timber had been done in accordance with the conditions, restrictions and limitations contained in the permit mentioned in said instruction.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the fact that those cutting under the permit, referred to in said instruction, may have misapprehended their rights thereunder would not mitigate damages resulting therefrom, and that they would be liable for the value of any timber so cut. The Court thereby took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.



7. The Court erred in instructing the jury as follows:

“But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he has made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are wholly unable to determine it, then, even though you find the defendant responsible, the plaintiff can not recover beyond nominal damages.”

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the manner of the taking of the timber by defendant might have been such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, and that in such a case a less degree of certainty in establishing the extent of plaintiff's damage is required than otherwise.

To which portion of said instruction defendant duly excepted; and defendant assigns the giving of such portion of said instruction as error as an abstract proposition of law, and furthermore, in any event inapplicable to the evidence, there being no evidence whatsoever that the manner of the taking of the timber was such as to enhance the difficulty of the plaintiff in establishing the exact extent of the wrong committed upon it, and, therefore, to permit a recovery of damages on proof less certain as to the extent of such damages than would otherwise be required.

8. The Court erred in instructing the jury as follows:

“It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff’s land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of \$211,854.10. But should you find that plaintiff is entitled to recover you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff’s estimate, and that is always subject to control by the evidence in the case.

“If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.”

To the giving of which said instruction defendant duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law, in this, that thereby the jury was instructed that it might allow damages against defendant, if in fact any damages were found by it to be recoverable, computed at the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale, even though he did not know that the corporations named, acting under his direction and control, had knowingly and willfully cut and converted the timber mentioned in the complaint, or any part thereof, and even though defendant did not know anything whatsoever about such cutting and conversion; and, further, that said instruction was erroneous as inapplicable to the evidence in the cause, there being no evidence whatsoever to show that defendant knew, or should have known, or had knowledge or notice, of the facts, or any of them, concerning the alleged cutting and conversion; and that there was no evidence whatsoever to justify the finding that defendant, in the conversions complained of, acted willfully, maliciously, or was conscious of any wrong-doing on his part, and that thereunder defendant should not be held liable for damages based upon a higher value of the timber converted than its stumpage value, to wit, the sum of one dollar (\$1.00) per thousand feet.

9. The Court erred in instructing the jury as follows:

“If you find that the defendant, or any of said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mis-

taken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

To which said instruction defendant duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law and inapplicable to the case, inasmuch as under the pleadings the plaintiff alleged that the value of the timber alleged to have been converted while in place in the stump, did not exceed one dollar (\$1.00) per thousand feet, and that plaintiff was thereby limited to such value as the basis for computing the value of the timber taken on the theory of an innocent trespass, and was, furthermore, inapplicable to the case, inasmuch as there was no evidence whatsoever as to what was the cost of manufacturing the timber into lumber, or what was the value added to said timber by reason of manufacturing the same into lumber, and that, therefore, there was no basis from which the jury could determine, under the instructions of the Court, any other value of the timber converted than that based upon the value of the tree in place, namely, not to exceed one dollar (\$1.00) per thousand feet, board measure.



10. The Court erred in instructing the jury as follows:

“In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.”

To which said instruction defendant duly excepted; and defendant avers that the giving of said instruction was erroneous, in that, so long a period of time had elapsed between the commission of the act or acts of conversion complained of and the bringing of said action, there being no adequate, or any, explanation, justification, or excuse for such delay; and, further, in that the Court failed to instruct the jury that its finding of the amount of interest, if any, should be separate and segregated from its finding as to damages, if any, exclusive of interest.

11. That the Court erred in giving any charge to the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars (\$16,000.00).

12. That the Court erred in giving any charge to the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars (\$16,000.00), with interest thereon at the rate of seven per cent (7%) per annum from the time, or times, of the conversion, or conversions, until the close of the trial of said action.

13. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction VI.) And defendant specifies as several and separate grounds wherein the Court erred in failing and refusing to give said proposed instruction last mentioned, the following:

(a) That there is no evidence whatsoever to justify a finding that any act of conversion was ever committed by any one.

(b) That there is no evidence to justify a finding that defendant is liable for any conversion that may have been established by the evidence.

(c) That there is no evidence to justify a finding that defendant personally directed, or participated in, the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(d) That there is no evidence to justify a finding that defendant entered into a plan or conspiracy, or conspired, with any one to commit or cause to be committed the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(e) That there is no evidence to justify a finding that defendant aided or abetted in the commission of the acts of conversion, or any of them, which the jury may have found to have been committed.

(f) For that the uncontradicted evidence established that all of the timber alleged in the complaint, or proved upon the trial, as being cut down, felled, and removed, and manufactured into lumber and appropriated, used, sold and converted by defendant, or by any joint tortfeasor of defendant, or anyone for whose acts defendant is responsible, was cut and removed from the public timber lands of the United States by persons then citizens and residents of the State or Territory of Montana, for agricultural, mining, manufacturing or domestic purposes, and was actually used for such purposes and not transported out of the said State or Territory of Montana, and that at the time mentioned in the complaint herein, there were no regulations made or prescribed by the Secretary of the Interior respecting said matter.

14. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find that the defendant never came into possession of the timber, and never purported to assume or assumed control over it, then your verdict must be for the defendant.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction III.)

15. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders, liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction IV.)

16. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“If you find that any of the timber, for the conversion of which this action is brought, belong to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them the purchase price which was received for such timber so converted was paid to any corporation in which the defendant was a stockholder or officer, yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, nor does this constitute a conversion by defendant of the plaintiff's property.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction V.)



17. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“I instruct you that conversion consists in an act of willful interference with any chattel without lawful justification, whereby the person entitled thereto is deprived of possession of it. The chattels for the conversion of which this action is brought consist of timber or lumber claimed to be owned by the United States, and if you find that the United States did own this timber, or lumber, yet, as matter of law, if the defendant in this case did not interfere with the possession of the United States in or to the timber or lumber, for the conversion of which this action is brought, then your verdict must be for the defendant.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction VII.)

18. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“The burden of proof is on the plaintiff not only to establish by a preponderance of the evidence that timber has been unlawfully taken from the lands involved in this controversy, or from some portion thereof, but it is also incumbent upon the plaintiff to show, by a preponderance of the evidence, by whom the same was taken, and the quantity thereof, and I instruct you that, even if you should be satisfied from the evidence that timber had been unlawfully converted, and that the defendant was responsible therefor, nevertheless, if, from the evidence, you are unable to ascertain the quantity or extent of the timber taken, your verdict must be for the defendant, and, in this same connection, I instruct you that you are not permitted to guess at the quantity taken or to speculate as to the amount. You must, in such case, find a basis, in the preponderance of the evidence, for your computation in computing the amount of timber taken.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction IX.)

19. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in section 22, township 14 north, range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and to keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, sale, or disposition. Even a knowledge upon A. B. Hammond's part that Boyd was an employee of the corporation and was cutting timber for the corporation would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd's cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction X.)

20. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“If you believe from the evidence that Henry Hammond, during the period while the Edgar Claim was cut, was the sole owner of the Bonner Mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XI.)

21. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“If you find from the evidence that timber was cut from Lot 10 in Section 18 by the Big Blackfoot Milling Company at a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said timber. If he knew nothing of the taking thereof, and took no personal part therein, he would not be liable, although the corporation in which he was a stockholder and director would be liable.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XII.)

22. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita Mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita Mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof.”

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XIII.)

23. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

“If you find from the evidence that the Montana Improvement Company erected the Bonita Mill and sold the same to Fred A. Hammond, and that Fred A. Hammond in turn sold the same to George W. Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant, A. B. Hammond, had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of



the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs, is a question for the jury. But even if the Montana Improvement Company should be found by you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of the Montana Improvement Company, or was an officer thereof. As already said to you, in the case of a corporation a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XIV.)

24. The Court erred in permitting the witness William Greene to answer the question as follows: "From your experience as a scaler of timber, can you judge from what you observed on section 18 there, which portion of the section had been cut first?" by saying: "On the southeast quarter of these lots." And in overruling defendant's objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-A.)

25. The Court erred in permitting the witness William Greene to answer the question as follows: "From your experience, can you tell the time that had elapsed between the first cutting and the second cutting?" by

saying: "Well, in my judgment, it would be somewhere about five or six years." And in overruling defendant's objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-B.)

26. The Court erred in denying defendant's motion to strike out the testimony of the witness William Greene and conclusions made by him concerning the amount of timber testified to by the witness as having been cut and taken from lands described in the complaint; upon the ground that such testimony and conclusions were hearsay, irrelevant, incompetent and immaterial, and to which ruling of the Court defendant duly excepted. (Exception No. 1-C.)

27. The Court erred in permitting the witness, John M. Keith, to answer the question as follows: "And is it not also true that if the Missoula Mercantile Company had not carried Mr. Greenough he could not have carried on those operations?" by saying: "I think that is true of many of them in those days; there were very few persons then who had any amount of means"; and in overruling defendant's objection thereto, upon the ground that it was incompetent, irrelevant and immaterial and not cross-examination. (Exception No. 2.)

28. The Court erred in overruling the question propounded by defendant to the witness, William H. Hammond, as follows: "At the time that you made this purchase, was it an out and out straight business transaction, whereby it was intended that the title, both legal and equitable, should pass to you, or was it intended and agreed among you that you should take title and

hold it for some other concern, person or corporation?" defendant thereby intending to elicit, and would have elicited, from the said witness an answer to the effect that said transaction was an out and out straight business transaction and that it was intended that he should take the title, both legal and equitable, for his own use and benefit, and in sustaining plaintiff's objection to said question, upon the ground that it was leading and suggestive, and upon the further ground that the instrument speaks for itself as to what it is. (Exception No. 3.)

29. The Court erred in refusing to permit the document bearing date February 10, 1888, purporting to be a lease between the Blackfoot Milling and Manufacturing Company, as lessor, and William H. Hammond, as lessee, to be offered in evidence, defendant offering said document as the document under which the said William H. Hammond took possession of the leased premises, and in sustaining plaintiff's objection thereto for the reason that the document does not bear on its face any authority from the Blackfoot Milling and Manufacturing Company for its execution; that it is merely signed by the president; that it is not acknowledged before a notary public and that it is an instrument affecting the right of possession to real property for more than one year; that there is nothing to show that it is the instrument that it purports on its face to be; in other words, the instrument purporting to be executed by the Blackfoot Milling and Manufacturing Company does not bear the seal of that company. (Exception No. 4.)

30. The Court erred in refusing to allow the witness, William H. Hammond, to answer the following question: "I now ask you to state from your recollection, what the terms of the instrument were that you had a duplicate of, that purported to be a lease?" defendant arguing that it was the document under which the said William H. Hammond took possession of the Bonner Mill, and further contending that it went to the question of his good faith in everything he did, and in sustaining the objection of plaintiff to the question, for the reason that the instrument itself would be the best evidence of its terms. (Exception No. 5.)

31. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question as follows: "While you were operating the property under that lease that you have testified to, state how much rental you paid," for the purpose of showing the *bona fides* of the transaction, and in sustaining the objection of the plaintiff to said question, on the ground that the lease itself should be the best evidence of the amount of rental that was to be paid. (Exception No. 6.)

32. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "To whom did you pay rental?" which, had the witness been permitted to answer same, he would have stated that he paid rental therefor to the lessor, Blackfoot Milling and Manufacturing Company, thereby tending to establish the *bona fides* of the transaction under which he became and continued to be lessee of said property, and in sustaining the objection of plaintiff to said ques-



tion on the ground that the lease itself should be the evidence of the person to whom the rental was paid. (Exception No. 7.)

33. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "Was there any provision of any kind for the extension of the original lease which you have mentioned?" defendant thereby intending to show, and the said witness would have stated, that there was such provision and that such provision was inserted as part of the consideration moving to him for his transfer to the said Blackfoot Milling and Manufacturing Company of the said property which he had theretofore owned in severalty and absolutely, and thereby evidence would have been furnished tending to establish the original *bona fide*, absolute and several ownership of the said witness of said property and of the *bona fide* character of the transfer by him of said property to said Blackfoot Milling and Manufacturing Company and of the lease that was made to him by said company, and in sustaining the objection interposed by plaintiff to said question, on the ground that it called for the giving of the provisions of the lease. (Exception No. 8.)

34. The Court erred in refusing to permit the witness William H. Hammond, to answer the question propounded to him by defendant as follows: "Mr. Hammond, state whether or not while engaged in the logging business in the State of Washington you obtained credit from any mercantile concern?" defendant thereby intending to, and would have, elicited from the witness an answer to the effect that he had obtained such credit,

and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 12.)

35. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question propounded to him by defendant as follows: "State whether or not while in business in Washington it was your custom to give orders upon any mercantile house in payment of your men," by which question it was intended to elicit the fact that it was, and that, therefore, there was nothing sinister in the following of the same practice at a later date, as indicating any undue or other relationship than that of debtor and creditor between defendant or the Missoula Mercantile Company, on the one hand, the said witness, on the other; and in sustaining plaintiff's objection to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 13.)

36. The Court erred in denying the admission in evidence of those two certain affidavits, dated November 21, 1885, and purporting to have been made by H. A. Ameraux and William H. Smith, which the witness, G. W. Fenwick, identified as having been seen by him before he made his purchase of the Bonita Mill; each of the said affidavits, in substance, sets forth that affiant was familiar with the country lying along the line of the Northern Pacific Railroad between the Town of Missoula and the Town of Bearmouth, in the Territory of Mon-

tana; and that he was enabled to testify understandingly with regard thereto; that said land was mineral in character and not subject to entry under existing laws of the United States as agricultural land, and that to his certain knowledge there were many mineral locations, leads, lodes and ledges bearing gold, silver and other precious metals; and that within said limits and near said railroad there was an organized mining district, in which were a number of mines then being worked for precious metals; and that said country and lands were essentially mineral land and unfit for agricultural lands, and were not chiefly valuable for the timber thereon; defendant thereby intending to show the good faith, and basis for the good faith, of the said G. W. Fenwick in his belief that the lands upon which he cut timber were mineral lands, upon which he might rightfully cut timber under the provisions of the Act of Congress of June 3, 1878; and in sustaining the objection of the plaintiff to the admission in evidence of said affidavits, for the reason that they were, and each of them was, wholly irrelevant, incompetent and immaterial, and on the further ground that each is an *ex parte* affidavit and an attempt to introduce evidence as to the mineral character of the lands in question under conditions when the plaintiff in this case has had no opportunity to examine or cross-examine the witness testifying as to the mineral character of the land. (Exception No. 13-A.)

37. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question put to him by defendant as follows: "What acts, if any, of management of the Bonita Mill property on the Hellgate, did

Mr. A. B. Hammond exercise during the time that you have testified to, from your purchase in 1886 until the time that you gave up the mill?" defendant thereby intending to elicit from the witness, and the witness would have testified, that the said A. B. Hammond did not exercise any acts whatsoever of such management at any time; and in sustaining the objection of plaintiff to said question, on the ground that it called for the conclusion of the witness. (Exception No. 14.)

38. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question propounded to him by defendant as follows: "State whether or not demand was ever made upon you by any officer of the federal Government for an inspection of your books or records at any time during the time that you were operating this property", by which it was intended to elicit, and the said witness would have testified, that no such demand had been made; and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial. (Exception No. 15.)

39. The Court erred in requiring the defendant, A. B. Hammond, as a witness, to answer the question propounded, upon cross-examination, by plaintiff to him, as follows: "How much did you ultimately realize from the sale of your interest in the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company, the Montana Improvement Company and the Missoula Mercantile Company?" by saying: "Well, so far as the Montana Improvement Company is concerned, I came out at the little end of the horn. I



never got anything out of it. I lost what I put in. The Blackfoot Milling and Manufacturing Company was a transfer of stock. I received stock in the Big Blackfoot Milling Company; that was really in effect a transfer of the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, and I received stock in that transfer; and in overruling defendant's objection to said question, on the ground that it was irrelevant, incompetent and immaterial, and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 16.)

40. The Court erred in requiring the defendant, A. B. Hammond, as a witness upon cross-examination, to answer the question propounded to him by plaintiff, as follows: "From the Big Blackfoot Milling Company, how much did you ultimately receive out of it?" by saying: "I got my *pro rata* out of the sale of the Big Blackfoot Milling Company. I could not say off-hand what it amounted to, but I think it was as much as my brother got"; and in overruling defendant's objection to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 17.)

41. The Court erred in requiring the defendant, A. B. Hammond, as a witness upon cross-examination, to answer the question as follows: "What was the value of your stock when you transferred your interest in the Missoula Mercantile Company?" by saying: "That is a matter of opinion. It did not increase very much. I got six per cent dividends on my stock in the Missoula Mercantile Company. I took stock in another corporation"; and in overruling the objection of defendant to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 18.)

42. The Court erred in requiring the defendant, A. B. Hammond, as a witness, upon cross-examination, to answer the following question: "What is your estimate of its value (the value of the holdings of shares of stock by witness in the Missoula Mercantile Company) at the time of your disposition of it?" by saying: "I do not consider that it depreciated any. It was worth as much as it was originally worth, if not more"; and in overruling the objection of defendant to said question, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 19.)

43. The Court erred in requiring the defendant, A. B. Hammond, as a witness, upon cross-examination, to answer the question as follows: "Can't you give it to me in dollars and cents so we can get it into the record?" by saying: "I should judge it was worth at least two hundred and fifty or three hundred thousand dollars"; and in overruling the objection of defendant to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 20.)

44. The Court erred in permitting the witness, George B. Archibald, to answer the question as follows: "You may state the examination you made of each section separately and what you found upon it and your conclusions as to the mineral or non-mineral character of the ground," by saying: "Starting in with section 10, township 11 north, range 16 west, as to the north half of the northwest quarter and the northwest quarter of the northeast quarter, I found that most all of those three forties were sandstone, with a little lime in the extreme northeast quarter, and there was no excavation of any nature there, absolutely nothing to indicate the land having any value for mineral purposes. The formation dipped to the southwest, and as I said, there was no excavation of any kind, nor anything to indicate the mineral character. The sandstone is not mineralized. Then take the south half of the southeast quarter of

section 10 and the northeast quarter of the southeast quarter of section 10, the same township and range, I found that the northeast quarter of the southeast quarter was entirely underlain with sandstone, and in the southeast quarter of the southeast quarter, practically the whole forty was covered with diabase. Diabase is an igneous rock, consisting of plagioclase and feldspar. It may contain minerals. That rock in this particular place did not contain minerals. In the other forty, that was underlain mostly with valley alluvium, and the formation in places does not show for that reason"; and in overruling the objection of defendant interposed to said question, upon the ground that it was irrelevant, incompetent and immaterial and not rebuttal. (Exception No. 21.)

45. The Court erred in permitting the witness, George B. Archibald, to answer the question as follows: "I wish you would state whether or not you found any minerals, or whether the rock is of such a character as usually bears minerals?" by saying: "The only possible place in any of this ground that I have described, was over in section 10, where I would expect to find any mineral and that would be in the diabase. For that reason, we examined that very thoroughly and found several broken, fractured zones. I went so far as to have assays made of that rock and got absolutely nothing from it"; and in overruling the objection of defendant interposed to said question, upon each and all of the ground as stated and set forth in the last assignment of error herein, to wit, assignment 44. (Exception 22.)



46. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indications of mineral on said section 14?" by saying: "I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 27.)

47. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral on section 12, township 11 north, range 16 west?" by saying: "On the southwest quarter of the southwest quarter, there was a fractured zone there in igneous material that showed iron stains, but I do not believe it would be considered mineral in character"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 29.)

48. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral in section 8, township 11 north, range 15 west?" by saying: "No, sir, I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 30.)

49. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did

you examine section 18, township 11 north, range 15 west?" by saying: "I did, and saw nothing there to indicate that it was mineral in character"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 31.)

50. The Court erred in granting the motion of plaintiff to amend the complaint on file herein on its face, by adding to the last line of the prayer of said complaint: "And for interest thereon"; and in overruling the objection made by defendant to the allowance of such amendment. (Exception No. 39.)

51. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1891, marked "Plaintiff's Exhibit No. 5," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to said Missoula Mercantile Company. (Exception No. 01-A.)

52. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of

Missoula Mercantile Company for the year 1892, marked "Plaintiff's Exhibit No. 6," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block and also the Hammond Block, were assessed to Missoula Mercantile Company. (Exception No. 01-B.)

53. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1893, marked "Plaintiff's Exhibit No. 7," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to Missoula Mercantile Company. (Exception No. 01-C.)

54. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1894, marked "Plaintiff's Exhibit No. 8," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the said Bonner Mill property,

the Florence Hotel and Eddy Block, Eddy residence, E. L. Bonner residence, "W. H. Hammond residence \$2500" and "W. H. Hammond, Levasseur house \$400" were assessed to the Missoula Mercantile Company. (Exception No. 01-D.)

55. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1890, marked "Plaintiff's Exhibit No. 9," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that 6,750,000 feet of lumber and 4,000,000 feet of logs were assessed to Missoula Mercantile Company, and that the Florence Hotel and Eddy Block were assessed to Missoula Mercantile Company. (Exception No. 01-E.)

56. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1890, marked "Plaintiff's Exhibit No. 10," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Fowler Mill, the Tyler Mill, the McClain Mill and the Silver Thorn Mill and outfit, were assessed to Missoula Mercantile Company. (Exception No. 01-F.)



57. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of the Missoula Mercantile Company for the year 1895, marked "Plaintiff's Exhibit No. 11," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta*, and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Hammond Block, Florence Hotel and Eddy Block, and Eddy residence; also "W. H. Hammond residence \$2500" and "W. H. Hammond, Levasseur house \$400," were assessed to Missoula Mercantile Company. (Exception No. 01—G.)

58. The clerk of the Court and the Court erred in taxing and the Court erred in confirming the taxation of costs herein made by the clerk in this, that the mileage, amounting in all to the sum of one hundred seventy-eight and 30/100 dollars (\$178.30), of seven certain witnesses coming from without the Northern District of California, was computed upon the mileage actually and necessarily traveled by said witnesses within said District, whereas the proper mode of computation was to allow to exceed one hundred miles going and returning for each witness, that is to say, not to exceed ten dollars (\$10) for each of said witnesses, which would amount in the aggregate to the sum of seventy dollars (\$70), thereby decreasing the amount of said item in the sum of one hundred eight and 30/100 dollars (\$108.30).

## Brief of the Argument.

### 1. THE EVIDENCE IS INSUFFICIENT TO CONNECT DEFENDANT WITH ANY CONVERSION THAT MAY HAVE BEEN PROVED.

#### REVIEW OF THE EVIDENCE.

Plaintiff's theory as to the basis of defendant's responsibility in the premises is stated by the Court in its charge to the jury (Tr. p. 759) :

“The theory advanced by the plaintiff in this case as to the method pursued in the alleged conversion is that the lumber sued for was taken as the result of a continuing series of acts covering a number of successive years, but all a part and parcel of one general unlawful scheme and arrangement entered into between the defendant and his associates under the guise and form of different corporations organized by them with the intent, and designed to accomplish their purposes, of appropriating such lumber; and that the operations to that end were carried on by such corporations by the means of establishing different mills and logging camps in the names of, or conducted by, different individuals or corporations, but all in fact connected and acting in concert, and all under the general direction and management of the defendant for said corporations. Not that the defendant was absolutely in control of such corporations or nominally their general manager, but that the operations carried on to take and appropriate the plaintiff's lumber were in a general way under defendant's direction and control.

If you find that this theory is sustained by the evidence, it would establish an unlawful taking and it will not be material to the defendant's responsibility that he should be shown to have been immediately present on each occasion that lumber was taken and personally directing the operations. It will be sufficient if it appear that any lumber so taken was cut and carried away as a result of the

general directions or instructions of the defendant in pursuance of such concerted plan, and was subsequently appropriated by defendant for the benefit of himself and the corporations named with a knowledge that it was the property of plaintiff."

This topic calls for an elaborate review of the logging and milling operations upon the Blackfoot and Hell Gate; of the persons, including corporations, by whom these operations were conducted and of the relationship of defendant thereto. It necessitates a consideration of the economic life of that country in those early days. From an industrial and economic standpoint the early eighties in Montana were far more primitive than is indicated by the date. It was not until '83 that the Northern Pacific Railroad was completed—and then only technically completed at that, for the purpose of earning its land grant—and communication by rail established between Montana and the outside world. California, prior to the coming of the trans-continental railroad, furnishes no index to these pioneer times in Montana, for, unlike California, Montana was without internal or other water communication.

Acts, such for instance as the manager of a general country store telling would-be lumber camp laborers at what mills they might find employment, have in themselves no sinister significance anywhere and particularly when the economic relation of a pioneer country store to the other industries surrounding it is fully understood. And here, as with all human associations, traditions and methods of doing business, such course of conduct generally persists for a con-

siderable while after the conditions which are responsible for its existence have ceased to exist.

With these preliminary observations we will proceed to a consideration of the relation of defendant in his business activities with the industrial life of western Montana and particularly its lumber industry during the period charged in the complaint, that is, from January 1, 1885, to January 1, 1895, and also prior thereto in so far as such earlier activities may throw light on the particular period under consideration. This will involve an examination of the testimony of the defendant, of the witnesses, W. H. Hammond and Geo. W. Fenwick, who were more particularly connected with the operations in the Blackfoot and Hell Gate respectively. Then we will consider the testimony offered by the Government of former employees and officers in some of the companies with which defendant was connected as a stockholder or director and of loggers, teamsters and contractors engaged in the woods, which evidence plaintiff contends is sufficient to establish such a degree of participation on defendant's part in the conversion alleged to have been committed as that defendant may be held personally liable therefor. In doing this we shall endeavor to make a complete presentation of the facts so that our opponent may be able to concede the facts are as stated in our brief and confine himself to a consideration of the inferences which may be legitimately drawn from those facts. This method may prove tedious. It certainly is more work for ourselves; but in the long run we feel confident it will save time and effort of this Court in what



we know will be its painstaking effort to do justice in the premises.

(A) *The Montana Improvement Company, Its Origin, Activities and Liquidation and as to Defendant's Direct Personal Relation Thereto.*

Defendant went to reside in Montana in 1872. He settled in the town of Missoula, then containing about 400 inhabitants, and was there employed as a clerk by E. L. Bonner & Co., a firm engaged in trading with the Indians and trappers, in horse dealing and in the general merchandise business. E. L. Bonner and Col. R. A. Eddy comprised the firm. In 1876 this copartnership was dissolved and a new copartnership known as Eddy-Hammond & Co. was organized to succeed to the business of the said E. L. Bonner & Co., which was comprised of Bonner, Eddy and defendant. Defendant took a one-third interest in the firm for which he paid \$4000 in cash and the balance of some \$3000 or \$4000 he got credit for, which he afterwards paid up. This copartnership existed until August, 1885, when Missoula Mercantile Company, a corporation, was organized to take over the business of the copartnership. This copartnership engaged in the same line as the said E. L. Bonner & Co. and the business was done almost entirely on credit (Tr. pp. 639-40; pp. 686-7). Defendant thus describes the course of business in the matter of extending credit during the life of Eddy-Hammond & Co., which was likewise followed by Missoula Mercantile Co.:

“At the commencement of their business, and in fact, during the existence of the copartnership, their business was largely with the farmers, with

the miners and with the fur traders. We had a large Indian trade, which extended as far north as the British line; we also had some dealings with the small saw-mills and flour-mills that were in the country at that time. As I say, the business was largely done on credit, and when we supplied customers with goods, we generally had to finance them and take care of them until such time as they could sell their crops or their furs or until the stock raiser could sell his cattle. We advanced them provisions or we advanced them money. We advanced them money to pay their taxes and paid their men. At that time there were farmers in the vicinity who were our customers; it was quite an agricultural country. We had quite a large farming trade in the Bitter Root Valley and in the matter of the payment of men, this method was extended to the farmers as well as our other customers. The method by which credit was extended, with reference to the form of the paying out of goods or money, was as follows: We credited, for instance, different farmers; if one farmer was indebted to another and didn't have the money to pay him, he would frequently give an order on Eddy-Hammond & Company to have his account charged up to the party's account who gave the order. That was so general in that section of the country that transactions of that kind came to be known as Bitter Root turns. In a sense, one man advanced money to pay another man's debts. He sometimes collected a bill from the farmer, but did not get any money; it was charged up to another farmer, to another customer. There were sawmills in this country in the State of Montana in that vicinity prior to the inception of the Northern Pacific Railway; we had dealings with sawmills at that time. We advanced them goods and we dealt with the sawmills the same as we dealt with the farmers and stockmen. In reference to the payment of their men, they gave orders on our firm for the payment of their men, which we ac-

cepted and paid and charged up to them. At no time was the firm of Eddy-Hammond & Company a dealer in lumber. It did not buy or sell lumber at all. The firm of Eddy-Hammond & Company sold out its business to the Missoula Mercantile Company in August, 1885. After its organization, the Missoula Mercantile Company carried on business along the same lines that Eddy-Hammond & Company had carried it on; it extended credit to the farmers, stockmen, sawmill men, contractors and builders of the railroad, traders and miners; it continued to do the same class of business. In the matter of extending credit, both for the money paid out and for goods, wares and merchandise purchased—we accepted orders from the customers. In fact, it was necessary in that country, at that time, when you undertook to carry a customer that you had to furnish him money to pay his men and to do his business until such time as he could raise his crop or sell his product and pay his bills. There was no difference in the method of extending credit practiced by the Missoula Mercantile Company from that practiced by its predecessor, Eddy-Hammond & Company. The Missoula Mercantile Company never dealt in lumber; it never owned any sawmills, nor did it even own any stock in any corporation interested in sawmills” (Tr. pp. 641 et seq.).

Besides the firm of E. L. Bonner & Co. above mentioned, of which Bonner and Col. Eddy were the members, for whom defendant clerked, which developed into the firm of Eddy-Hammond & Co., and later Missoula Mercantile Co., there was another firm of the same name of E. L. Bonner & Co., a copartnership created in 1881 for the purpose of contracting with Northern Pacific Railroad Company to furnish it with ties, piles and lumber and for the clearing of the right of way for

about 280 miles on the main line of that railroad. Bonner, Col. Eddy and defendant were the members of that firm and in addition thereto J. H. Robertson, who was not at any time a member of the firm of Eddy-Hammond Co., or a stockholder in Missoula Mercantile Co. (Tr. pp. 643, 686). This firm received the appointment from Northern Pacific Railroad Company in 1881 to take from the public lands adjacent to the line of the railroad material for the construction of the railroad, which right was permitted under the United States Statute creating Northern Pacific Railroad. This appointment was made in pursuance of the Statute and Regulations of the United States Land Office in relation thereto. A copy of the appointment is set out (Tr. pp. 644 et seq.).

Defendant describes (Tr. pp. 650-1-2) the operations of E. L. Bonner & Co. in furnishing piling and lumber for Northern Pacific Railroad Company construction, from which it appears among other things that great quantities of timber, unidentifiable from that cut at divers later dates, were taken from many of the same sections of land along the Hell Gate which are involved in this action.

The railroad business of E. L. Bonner & Co. was taken over by Montana Improvement Co. (Limited), incorporated August 8, 1882, and its Articles of Incorporation are set forth (Tr. pp. 390 et seq.). The principal office of Montana Improvement Company was at Deer Lodge where the president, E. L. Bonner, resided. Shortly after the completion of the Northern Pacific Railroad Bonner came to Missoula to reside,



and at that time—the fall of 1885—the principal place of business of the corporation was changed from Deer Lodge to Missoula. While the corporation was incorporated in 1882 it did not start active business until after the Northern Pacific Railroad was completed. It went into active business in 1884 and out of active business in 1885 (Tr. pp. 653, 4, 5). The defendant was treasurer and manager of that company—manager until about 1885 (Tr. p. 694). July 2, 1883, a contract was entered into between Northern Pacific Railroad Company and Montana Improvement Company (Tr. pp. 710 et seq.) which among other provisions gave the Railroad Company 51% of the stock of Montana Improvement Company and Montana Improvement Company had the right for twenty years to enter upon timber lands in the then territory of Montana and Idaho granted by the Act of Congress to said railroad and cut timber therefrom, making payment therefor. This was supposed to be a very valuable contract by the promoters of Montana Improvement Company, of which Bonner was the head and front (Tr. p. 698). The said Mineral Land Act of June 3, 1878 (with the purposes of which this Court is familiar; 121 Fed. 504; 133 Fed. 380) conferred the right on residents of Montana, other than railroad companies, to cut timber on mineral lands for building, mining, agricultural and other domestic uses. As the grant to Northern Pacific Railroad of the odd numbered sections within the limits of the grant did not attach to such lands as were mineral, it was expected that this corporation as a resident of Montana would be able to cut timber under the

Mineral Land Act of June 3, 1878, where the physical conditions warranted same, and where they did not that the corporation could avail itself of the railroad's right as proprietor of the odd numbered sections or the land that would become such on survey. Thus the development of Montana, so bound up with the lumber industry not only furnishing lumber for construction purposes but as well for mining timbers and stulls, might proceed without embarrassment. However, Commissioner Sparks, of the General Land Office, took the position that the ownership by Northern Pacific Railroad Company of stock in Montana Improvement Company would prevent the latter corporation from availing itself of the Mineral Land Act of June 3, 1878 (Tr. pp. 697-700), and in July, 1885, in consequence of the position taken by the commissioner (which both corporations were advised by their attorneys was not tenable, Tr. p. 700) Montana Improvement Company decided to go out of business, sell its property and liquidate (Tr. pp. 655, 700).

The attitude of the commissioner frustrated the very purposes of the organization of Montana Improvement Company which were that its operations would offend neither public nor private rights. It was often difficult to determine what were mineral lands within the meaning of the grant to the Northern Pacific Railroad. So complicated, indeed, that a commission was finally created by Congress to determine this fact. The individual operator in Montana cutting under the then unquestioned and broadly construed license furnished by the Mineral Land Act of July 3, 1878, found himself

confronted by the rights of the Northern Pacific Railroad. Combining the sanction of the license with the railroad's right (whatever it was) seemed the logical way to proceed without offending either public or private rights. The liquidation of Montana Improvement Company was due to the attitude of the General Land Office and not on account of any other law-suits brought by the Government against that company—referred to by plaintiff's witness Hathaway (Tr. pp. 204, 224, 228, 235). These suits were brought considerably after Montana Improvement Co. had entered upon its liquidation (Tr. p. 99) and involved the right of Northern Pacific Railroad and its grantees to cut timber on railroad lands prior to their survey. Montana Improvement Co. was a defendant with Northern Pacific Railroad in an action brought by the Government for an accounting and to restrain the cutting of timber on unsurveyed lands. This action numbered 115 in the records of Second Judicial District of Montana Territory was brought March 16, 1886. It was brought on the untenable theory that the Government and Northern Pacific Railroad were tenants in common. The demurrer of Montana Improvement Co. to the complaint was sustained and the case proceeded against the railroad alone, which prevailed in the trial Court. In the meantime Montana acquired statehood. So we find the affirmance of the trial Court's decision in

U. S. v. Northern Pacific Railroad, 6 Mont. 351;  
12 Pac. 769.

The Government took an appeal to the U. S. Supreme Court, but later dismissed same (140 U. S. 703; 35 L. Ed. 593).

And now, to return to the limited activities of the Montana Improvement Company and its liquidation:

Defendant had a one-fifteenth interest in the stock of Montana Improvement Company. Other stockholders besides Northern Pacific Railroad Company were Bonner and Eddy. Hathaway had a little stock (Tr. p. 200) and a man named Conklin had 250,000 shares, which would be one-eighth (Tr. p. 655). Marcus Daly appears to have been one of its incorporators (Tr. p. 391). Montana Improvement Company acquired the mills at Wallace. Wallace—formerly called Clinton—was on the Hell Gate River between Bonita and Bonner—eight miles down stream or West from Bonita and fifteen or seventeen miles East of Missoula. These Wallace mills were owned by a man named Katchin and had been operated in the business of furnishing bridge timbers and other lumber for the Northern Pacific Railroad construction. Montana Improvement Company had a shingle mill at Noxon, Montana, about one hundred miles *West* of Missoula. It acquired the Thompson or Allen mill, which had been operated at Thompson Falls and which was subsequently erected at Bonita. The company had lumber yards at Butte, Helena and Deer Lodge. It commenced the construction of a dam on the Blackfoot River in 1884 (at a point which subsequently became the town of Bonner). The dam was not completed but went out in the flood in the spring of 1885.

When Montana Improvement Company decided to liquidate and go out of business it disposed of its property as follows:



The remnant of the company's dam at Bonner was sold to W. H. or Henry Hammond as he is more generally called. The Thompson or Allen mill was sold to Fred Hammond at a price which included the cost of setting it up at Bonita,—this being attended to by Montana Improvement Company. Montana Improvement Company never operated the mill. One of the mills at Wallace was sold and moved away. The other continued to operate at Wallace (it is not pretended that these mills at Wallace manufactured any of the timber involved in this action) for a few months later, perhaps until the spring of 1886, when it was disposed of and moved away. The three lumber yards were sold, that at Helena, which figures throughout the testimony, to V. H. Coombs, which subsequently became Helena Lumber Company. Montana Improvement Company retained no interest in any of these properties. The shingle mill at Noxon burned (Tr. pp. 652-656).

Further light is thrown on these earlier operations of Montana Improvement Company by the witnesses, G. W. Fenwick and W. H. Hammond who later became identified with the Bonita and Bonner plants respectively.

Fenwick was employed by Montana Improvement Company at Wallace for about two and a half years prior to his purchase from Fred Hammond of the Bonita Mill in May, 1886 (Tr. p. 537). Eddy & Bonner employed him. Defendant did not have much to do with Montana Improvement Company at that time; he was manager nominally, not actively. As employee of Montana Improvement Company at first Fenwick's

duties were as shipping clerk, shipping left-over lumber that had been sawed in the work for the railroad under E. L. Bonner & Co.'s contract, which lumber had been taken over by Montana Improvement Company from E. L. Bonner & Co. Montana Improvement Company was not operating the mills at Wallace when Fenwick went there—Katchin was—the company commenced to saw lumber at Wallace in 1884 and Fenwick billed most of the lumber during the earlier period of his employment at Wallace to Northern Pacific Railroad for the completion of its construction work. W. H. Hammond was there a part of the time looking after the mills that were operated there in 1884. Then the work at Wallace ceased and Fenwick left the employ of Montana Improvement Company and after a few weeks bought the Bonita Mill from Fred Hammond (Tr. pp. 575-8, 696).

W. H. Hammond came to Montana in 1881 and was employed in building a wagon road for the Northern Pacific Railroad; then he had a contract with E. L. Bonner & Co. cutting ties and piling for the Northern Pacific, which occupied some two years. Later he worked for the Montana Improvement Company beginning in the latter part of 1884. He looked after the mills. Mr. Bonner was considered head of the company—more particularly financial head. Mr. Bonner and Mr. Eddy were the head men (Tr. p. 474). W. H. Hammond was in charge of the business at Wallace until some time in 1886, continuing in their employment while he built the first unit of the mill known as the Bonner

Mill and after the Blackfoot dam site had been transferred to him.

While so employed by the Montana Improvement Company he was cleaning up their old mills and looking after the remnants of their business (Tr. pp. 473-476, 696). The deed conveying the dam site from Montana Improvement Company to W. H. Hammond, dated July 3, 1885, is set out at Transcript page 430. He paid three hundred dollars for the old shacks and equipment and whatever passed by the quitclaim deed (Tr. p. 475).

Sydney C. Mitchell, a government witness, who was employed at various times at Wallace, Bonita and Bonner, testified (Tr. p. 92) in corroboration of the testimony of defendant, W. H. Hammond and Fenwick. He was employed by A. B. Hammond to work at Wallace (Tr. p. 93), but whether for the Eddy Hammond Company or Montana Improvement Company he did not know. He went to Wallace June 17, 1885—the day after the first Blackfoot dam went out (Tr. p. 98) and he went to work for G. W. Fenwick at Bonita in the fall of the following year—1886.

We have now considered the origin of the operation of G. W. Fenwick at Bonita and W. H. Hammond at Bonner. It is not claimed by the Government that any timber was cut on the Blackfoot before the winter of 1885 when Henry Hammond was building his dam and mill at Bonner. In the case of G. W. Fenwick, however, when he acquired the Bonita mill in May, 1886, it had already been in operation and hence

it becomes necessary to consider more in detail the alleged trespasses committed in the Hell Gate prior to that time and the defendant's relation thereto. An inventory was made when Fenwick bought the Bonita operation from Fred Hammond. He paid twenty-five or twenty-seven thousand dollars for the property, which besides the mill included railroad spur connections, the necessary buildings, cook house, etc.; also a complete logging outfit (Tr. pp. 538-9) and in the neighborhood of one million feet of logs and of sawed lumber in the mill and mill pond (Tr. p. 582). Fenwick could not tell from what particular sections the lumber and logs came from. Some were logged on what upon survey became odd numbered or railroad owned sections and admittedly not involved in this action (Tr. p. 596).

There is nothing in the testimony of the Government which denies or attacks the bona fides of the transaction between Montana Improvement Company and Fred Hammond already adverted to, whereby the so-called Thompson Mill was sold for a price which included its removal from Thompson Falls and erection at Bonita by Montana Improvement Company. There is nothing in conflict with the testimony that Fred Hammond conducted these logging and mill operations for his own account. The record shows that Fred Hammond is dead.

The Government witness, William A. Cook (Tr. 121), was section foreman of Northern Pacific Railroad at the time the siding was put in from the main track of Northern Pacific Railroad to the mill at Bonita. This was in the late summer of 1885 (witness was not sure



whether it was 1885 or 1886, but that it was the later year is made clear by the testimony of other witnesses). The siding was put in before the mill in order to ship the mill in in the cars. This witness had concluded that Eddy, who was in charge of the construction of the mill and siding, was representing Eddy Hammond & Co., but this appears to have been pure guess work (Tr. pp. 129-31). As we have seen, Missoula Mercantile Company took over the business of Eddy Hammond & Co. about August 20, 1885 (Tr. pp. 308 et seq.) and Cook testifies that the siding was put in in the late summer. Eddy was there as vice president of Montana Improvement Company engaged in the execution of its contract with Fred Hammond to transport the mill to Bonita and sell it set up. The important thing, however, is Cook's very clear testimony that Eddy had this operation in charge and that Eddy was about the mill all the time when it was being constructed. He thinks, if he remembers right, that defendant was there two or three times (Tr. pp. 122-3).

It should here be recalled that the Government has not claimed in its complaint, or otherwise, that defendant is responsible for any conversion through his relationship as partner, or otherwise, in the firm of Eddy Hammond & Co. The concerns named are Montana Improvement Company, Blackfoot Milling & Manufacturing Company, The Big Blackfoot Milling Company and Missoula Mercantile Company.

The Government witness, Harley, testifies in corroboration that he worked in and about Bonita, cutting timber, in 1885, for Fred Hammond. This was in the win-

ter and fall of 1885 and later, in May or June, 1886, his employment with George W. Fenwick commenced (Tr. pp. 258-9).

The Government witness, Hathaway (Tr. p. 196), sixty-seven years of age at the time of testifying and without an occupation to keep his mind alert, who admits he has not a good memory (Tr. p. 243), which also appears from the frequent contradictions and corrections in his testimony, nevertheless knew that the Fenwick mill was established at Bonita somewhere about 1885 and that Eddy had it in charge—looking after the erection of the mill. He testified the mill was run by Fred Hammond, who owned it (Tr. pp. 198, 223). He did not think defendant had any interest in the mill when it was under the management and control of Fred Hammond, because he knew that Fred Hammond sold out to George W. Fenwick (Tr. p. 204); that it was the Montana Improvement Company, not Eddy-Hammond & Co., that sold the mill to Fred Hammond (Tr. p. 223). In common with some other witnesses, he speaks of Eddy-Hammond & Co. as having been in the lumber business (Tr. p. 223), which is contrary to defendant's testimony that a firm known as E. L. Bonner & Co. was the name of the concern engaging in that business, which is also confirmed by the witness, Keith, hereinafter referred to, and the record evidence furnished by the appointment from the Northern Pacific Railroad Company, but, in any event, this is an immaterial matter, for Hathaway is positive that from the time of organization of Montana Improvement Company the co-partnership ceased entirely to have any lumber operations.

From that time on (1882) the co-partnership was in the mercantile business, which was ultimately sold to Missoula Mercantile Company (August, 1885) and a lot of employees taken in as stockholders (Tr. p. 223).

John M. Keith, now the president of a bank in Missoula, testified (Tr. p. 418) that he was employed by Eddy-Hammond & Co. in the year 1881, as a clerk behind the counter, and in 1882 was taken into the office of that concern and from then until the organization of Missoula Mercantile Company in August, 1885, was in charge of the office and the books of Eddy-Hammond & Co., and thereafter until 1888 occupied a like position with respect to Missoula Mercantile Company. He testified that the old firm of Eddy-Hammond & Co. was not, as a firm, engaged in the lumber business. Its three members, however, in addition to Robertson, were thus engaged as a copartnership under the firm name of E. L. Bonner & Co., to which Montana Improvement Company succeeded. He was never an employee of Montana Improvement Company and had no knowledge of it other than as a name (Tr. p. 423).

Defendant himself testified (Tr. p. 671) that he was at Bonita Mill but once during its construction and after that may have been at Bonita Mill once or twice; that he never gave any orders to any persons about any transaction in connection with the logging operations at the Bonita Mill (Tr. p. 667); that he was never on the lands that are reported as having been cut over (Tr. p. 668) and that with reference to the cutting upon the Hell Gate by Fred A. Hammond, or by Fenwick, during the time their mills were in operation he had no knowl-

edge as to the place or places from which they, or either of them, at any time procured any logs for their mill; that he did not know where they were cutting their logs (Tr. p. 683).

Government witness Hathaway testified that the sale from Montana Improvement Company to Fred Hammond and from Fred Hammond to George W. Fenwick was what it purported to be, a straight out and out, absolute transfer of the property (Tr. p. 227). He further testified that Fred Hammond bought the mill from Montana Improvement Company very soon after Montana Improvement Company brought it down and that Eddy was up there some little time and then Fred Hammond made the deal and bought the mill. "It was his mill and he sold it"; that the Montana Improvement Company did not run the Bonita Mill for more than a month or two—only a very short time—they started building the mill. They had to build bunk houses and stuff like that in there, some little lumber went for that "and then Fred went in and took charge and bought it".

We think the foregoing correctly sets forth all the testimony bearing on the relation of A. B. Hammond to Montana Improvement Company and of Montana Improvement Company to the mill at Bonita until Fred Hammond disposed of same to G. W. Fenwick.

(B) *The Bonita Mill of George W. Fenwick, the Hell Gate Timber. Defendant had no Direct Personal Relation Thereto.*

The purchase of the Bonita Mill by George W. Fenwick in May, 1886, for twenty-five or twenty-seven thou-



sand dollars (Tr. p. 538) from Fred Hammond has already been adverted to. The purchase price was evidenced by notes payable at divers dates. These notes were taken over by Missoula Mercantile Company in settlement of Fred Hammond's account with that company. Fenwick paid the notes (Tr. 426). Defendant testified that he did not participate in any of the negotiations of the sale of the Bonita Mill plant from Montana Improvement Company to Fred Hammond or from Fred Hammond to George W. Fenwick (Tr. pp. 656-7), though he knew of the latter (Tr. p. 696). The Government witness, Hathaway, recollected taking the inventory upon the sale from Fred Hammond to George W. Fenwick (Tr. p. 227) and that he did this at the request of Fred Hammond (Tr. p. 232). Later he requested that he be recalled, for he felt positive on further reflection that the defendant had asked him to take the inventory (Tr. pp. 227, 236-238). The change in the testimony seems only to have been of concern in the mind of Hathaway and he wound up by saying: "That is one thing A. B. Hammond can tell himself, if he says it ain't so you can take his word for it" (Tr. p. 242).

In this connection defendant testified that he had a very slight recollection on the subject. His recollection is that Fred Hammond and Fenwick had negotiated and come to an understanding and that they agreed on Hathaway to take the inventory for them and assist them. He has no recollection of sending Hathaway there, or telling him to go there, or anything of that kind (Tr. pp. 656-7). Fenwick testifies that his negotiations were altogether with Fred Hammond and that he had no negotiations

upon the subject with A. B. Hammond. Hathaway was selected to take the inventory because it was agreed upon between Fred Hammond and himself. How Hathaway came to come up to Bonita he did not know. "I may have sent word to him myself, or Fred Hammond may have done it, or I may have requested anyone in the office in Missoula to tell him" (Tr. pp. 555-6).

Fenwick testified (Tr. pp. 556-7) that defendant had no interest directly or indirectly in the Fenwick purchase of the Bonita Mill; nor did anyone else. The matter was a strictly private arrangement between Fred Hammond and himself and none of the profits of the business went to any other person or corporation than himself (Fenwick). He cut along the Hell Gate country from May, 1886, to May or June, 1891. During the years 1890 and 1891 his operations were very small and when the mill was finally closed in 1891 he went to the Bonner Mill, then operated by Henry Hammond under a lease, where he looked after the general office work, also manufacturing, shipping and taking care of orders. (Tr. 573).

As has already been observed, the land in the Hell Gate was not surveyed until May, 1902; there were no lines or corners and G. W. Fenwick didn't know whether he was cutting on even or odd numbered sections. The only survey was the territory covered by the Cramer Ranch (Tr. p. 549). As stipulated (Tr. p. 745), the only surveyed lands in the Hell Gate were those portions of Sections 8, 9, 10 and 11 lying north of Hell Gate River as it existed at the date of the survey, to wit, July 17, 1874, and Section 7, surveyed January 14,

1885, in Township 11 North, Range 16 West, M. P. M. Also it is stipulated (Tr. p. 743) that there was a patented placer mining claim in Section 23, Township 11 North, Range 15 West, on the Tyler Gulch, containing 159 acres. At the time of his purchase of the Bonita Mill Fenwick was familiar with the physical characteristics of the Hell Gate canyon and he describes same at Transcript, pages 539 et seq. He believed the land was mineral land within the meaning of the Act of June 3, 1878, Chap. 150; 20 Stats. at Large 88—a belief shared in by the community, the Courts and the Interior Department of the United States, and which belief prevailed until Mr. Justice Holmes, of the United States Supreme Court (Mr. Justice McKenna dissenting) held that the permission provided in the Act to cut timber from the public domain only applied in effect to mining claims or public lands susceptible to entry as such.

U. S. v. Plowman, 216 U. S. 372; 54 L. Ed. 523.

The case last mentioned originated in Idaho and when it was before the Circuit Court of Appeals the point therein involved was deemed to be so well settled by that Court that it was dignified only by a memorandum decision (151 Fed. 1022), Mr. Justice Ross stating that it was conceded by the Government that the facts in the case were substantially identical with those presented in the cases of

U. S. v. Bassie, 121 Fed. 504-57 C. C. A. 624, and

U. S. v. Rossi, 133 Fed 380, 66 C. C. A. 442.

The cases last mentioned reviewed and approved what had been the uniform course of decision of all the trial

Federal Courts. The U. S. Circuit Court of Appeals for the Eighth Circuit reached the same conclusion.

*Morgan v. U. S.*, 169 Fed. 242.

In fairness to Mr. Justice Holmes it should be stated that the report of the case of *U. S. v. Plowman supra* shows that there was no appearance for the Government's opponent.

Referring to the said Act of June 3, 1878, c. 150, Mr. Justice Morrow, speaking for the Court in the case of *U. S. v. Rossi*, *supra*, stated:

"This Act was passed, according to the views of Secretary Teller, of the Interior Department, expressed in 1 L. D. 697, to establish by positive enactment a right claimed and exercised by lumbermen for a period of about 30 years without interference on the part of the Government—the right to appropriate the timber on government lands, manufacture it unto lumber, and furnish it to the millmen, the miners, the farmers and other inhabitants of the district who could not or did not wish to do the actual cutting and manufacturing for themselves individually. He further said:

" 'The great object of the governmental supervision of the cutting of timber in those states and territories ought not to be to compel payment for timber so cut, but to prevent unnecessary waste, the cutting of the small trees under the size prescribed by the department, and to prevent waste by fires and other means'.

"The rules and regulations of the Secretary of the Interior in force until February 15, 1900, were in accord with these views, permitting owners of sawmills to cut timber and manufacture it into lumber for sale, under the requirement that it be sold to citizens of the state or territory wherein it was growing, and for 'building, agricultural, mining, and other domestic purposes' ".



The witness Fenwick stated that at the time of his purchase of the Bonita Mill he was aware of the ruling of Secretary Teller, just referred to in the opinion of the Court in *U. S. v. Rossi*, *supra* (Tr. p. 559). Subdivision 4 of the said ruling of Secretary Teller is found at 1 Land Dec. p. 698, and describes the character of the land, in reference to its physical characteristics, which he ruled came within the meaning of the Act as land upon which timber might be cut for the uses prescribed in the Act. This description is quoted and relied upon by the Circuit Court of Appeals for the eighth Circuit in the case of *Morgan v. U. S.*, *supra*, 169 Fed. at page 246, and is as follows:

“Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but where there are extensive valleys, plains or mountain ranges, and no known minerals exist, the land may be considered and treated as non-mineral”.

Concerning the description given by Secretary Teller of lands that might be deemed mineral within the meaning of the Act, the witness, Fenwick, testified that in his judgment the land he was about to cut over upon his purchase of the Bonita Mill was of the character that would bring it within the terms of the ruling (Tr. p. 558). There were other circumstances than this that led Fenwick to believe it was such mineral land and these circumstances are set forth (Tr. pp. 558-565; 588-89; 593-4).

In purchasing the Bonita Mill Fenwick was governed by the advise of his attorney, the late T. C. Marshall, of Missoula, and was acting under the advice of his counsel before and during the negotiations that led up to the purchase. As he says:

“I was led to believe and I sincerely believed that I was strictly acting in accordance with the law in going on this land, which I believed to be mineral”.

(Tr. pp. 559; 585.)

A rigid cross-examination of the witness, Fenwick, did not serve to cast any doubt as to his conference with counsel and the belief that he was acting within the law in the premises (Tr. pp. 586 et seq.).

Just at that time there was much local discussion concerning rules promulgated by Secretary of the Interior, Lamar, on May 7, 1886, and Fenwick thought his attention had been directed to the rules last mentioned (Tr. p. 587). This was a circular issued by Commissioner Sparks, of the General Land Office, to Registers and Receivers and Special Agents, and will be found in 4 Land Dec. 521. These rules became effective June 1, 1886, and all existing rules and regulations heretofore prescribed under the Act inconsistent therewith were thereby revoked. By paragraph 4 of this circular it was provided as follows:

“All cutting of such timber for sale or commerce is forbidden. But for building, agricultural, mining and other domestic purposes each person authorized by the Act may cut or remove for his or her own use by himself or herself, or by his, her or their own personal agent or agents only.”

Before the issuance of this circular the requirement that persons in the territory using the lumber for the purposes designated in the Act should cut the timber individually, or through an agent, and that cutting of timber for sale or commerce was forbidden, had not existed. This limitation did not remain in force very long and new rules and regulations were issued August 5, 1886, to take effect September 1, 1886, which did away with this limitation (5 Land Dec. 129).

As Mr. Justice Morrow observes in the case of *U. S. v. Rossi*, *supra*, the rules and regulations of the Secretary of the Interior which continued in force until February 15, 1900, permitted the cutting of timber commercially for the purposes mentioned in the Act and cutting was not restricted to doing it personally and through agents. By the rules and regulations of February 15, 1900, referred to by Judge Morrow, the cutting of lumber commercially was again prohibited and it is interesting to note (133 Fed. at page 384) that our Circuit Court of Appeals held in this case that the prohibition was one which was not within the power of the Secretary of the Interior to make.

Be this as it may, at the time Fenwick bought the Bonita plant the Sparks circular (4 Land Dec. 521) to take effect June 1, 1886, had been promulgated and apparently cutting could only be lawfully done by one acting as agent for another who was actually going to put the property to one of the uses specified in the Act. The result is we find Fenwick arranging to comply with this regulation which, as we have seen, remained in force but a few months.

Mr. Fenwick had a contract in writing with Marcus Daly, of the Anaconda Mining Company, by which Fenwick was appointed as the agent of Daly to cut this timber from the public lands and contained other provisions as to price, etc. (Tr. pp. 544-5). Before he completed the purchase of the Bonita plant from Fred Hammond he also arranged a contract with Marcus Daly to back him (Fenwick) to any reasonable amount he (Fenwick) required to run his operations there, and Marcus Daly in fact advanced him funds during the early stage of his, Fenwick's, operations. Later it was not necessary (Tr. pp. 569-70).

On cross-examination concerning this transaction with Marcus Daly the witness further described it at Transcript pages 592, 597-8 and 600. From this it appears that timbers were to be furnished for mining purposes; that Mr. Fenwick was to furnish him with lumber, saw it and ship it to him. Fenwick had no contracts with any other people to whom he sold lumber and he sold nearly all of his lumber to Daly. It also appeared that the contract contained an indemnity clause which was to save Fenwick harmless against any claims for stumpage that might come thereafter. Mr. Fenwick testified (Tr. p. 597) that he needed the protection of the indemnity clause for he knew that if for any reason the land should be held not to be mineral land the Northern Pacific Railroad Company would claim all of the odd sections. He believed the land was mineral land and that the Railroad Company had no right to what, when surveyed, would be the odd numbered sections, but he wanted to fortify himself on all sides. He thought (Tr.



p. 600) the question of whether or not the land was mineral land might be a question of law as well as a question of fact. That Marcus Daly had arranged to finance Fenwick at the commencement of his operations at Bonita is also in evidence by the testimony of the witness Keith (Tr. p. 425). Hathaway also testified as to Fenwick's contracts with Daly (Tr. pp. 214-15).

Defendant also testified to his belief that the portion of the Hell Gate country involved in this action was mineral land within the meaning of the Act of June 3, 1878, c. 150, and sets forth the basis of his belief (Tr. p. 668).

Woodworth, a civil engineer, went to the Big Blackfoot canyon as a timber inspector for the Northern Pacific Railroad Company in 1888 and was employed in this capacity about ten years (Tr. p. 494). He was there for the purpose of taking care of Northern Pacific timber in the state of Montana (Tr. p. 498). It abundantly appears throughout the record that timber was being indiscriminately cut from the Hell Gate canyon prior to, during, and for that matter subsequent to the period involved in this action; for instance, see Hathaway's testimony (Tr. p. 222); Woodworth's testimony, (Tr. p. 626), and that no stumpage was paid therefor (Tr. p. 221). In the Blackfoot, where there was no suggestion that the lands were mineral lands, the Northern Pacific Railroad charged Henry Hammond and the Big Blackfoot Milling Company, which succeeded him, at the rate of one dollar per thousand feet stumpage for timber cut from lands lying within one mile of the Blackfoot River and fifty cents where it was beyond

one mile (Tr. p. 445) and Woodworth was seeing to it that the railroad got what was coming to it (Tr. p. 496). There can be no question but that the Northern Pacific Railroad shared the common belief that the Hell Gate country was "mineral land" (Tr. p. 601).

The deposition of William K. Wills (Tr. p. 601) was offered in evidence by defendant, though he was called as a witness on behalf of plaintiff, and we submit his testimony shows a general mineral character of the Hell Gate, which under the Act as then and for many years thereafter interpreted, would clearly have authorized the cutting of timber thereon.

Defendant offered in evidence some half dozen "Notices of location of mining claims in the Wallace Mining District" (Tr. p. 610) and also (Tr. p. 564) a document evidencing the creation of Wallace Mining District, which was formed by miners and settlers in 1878, which embraces a large portion of the land in the Hell Gate involved in this action (Tr. p. 562).

Fenwick testified (Tr. p. 566) that while he was operating the mill at Bonita he saw the defendant there once or twice, mentioning the occasion of the visits. He testified defendant never gave him any directions as to the management, or the logging business, or concerning his (Fenwick's) operation; that defendant had nothing to do with the sale of Fenwick's lumber or purchase of logs, or cutting of lumber, or its shipment, or even the employment of his men. The government witness, Mitchell, testified that he never saw A. B. Hammond in the Hell Gate country except once, at Wallace, and never saw him at Bonita at all (Tr. p. 103).

(C) *The Bonner Mill, at First of W. H. Hammond and Later of Big Blackfoot Milling Co., the Blackfoot Timber. Defendant had no Direct Personal Relation Thereto.*

We have already learned of the beginnings of the Blackfoot operation and how in July, 1885, W. H., or Henry Hammond, paid three hundred dollars to Montana Improvement Company for the remnants of the dam (together with the shacks and equipment) which that company had attempted to construct at what became the sawmill town of Bonner and which had been washed out. Mr. Bonner represented Montana Improvement Company in making the sale of these remnants to W. H. Hammond (Tr. p. 475). At first this mill was known as the Blackfoot Mill, but as the mill increased in size and as extensive wood-working machinery was installed the settlement and mill became known as Bonner—this in 1888 (Tr. p. 434). W. H. Hammond was sole owner of the mill property until February, 1888, when Blackfoot Milling & Manufacturing Company was incorporated to take it over (Tr. p. 434). The articles of incorporation of Blackfoot Milling & Manufacturing Company are set forth at Tr. p. 386. W. H. Hammond operated the mill individually, just as he owned it; he had no partners; and no one shared directly or indirectly in the profits of his transactions (Tr. p. 434). He became a stockholder to the extent of about one-fourth in Blackfoot Milling & Manufacturing Company and as part of the consideration for the transfer of the mill property to the Company it was agreed that he should have a lease

on the mill property for two years, with the privilege of three, and such lease was actually entered into (Tr. p. 435). He operated this property under the lease for three years, possibly a little longer (Tr. p. 438). He sold the lumber he manufactured. Neither Montana Improvement Company, Missoula Mercantile Company nor A. B. Hammond sold it for him (Tr. p. 439). He operated the property until Big Blackfoot Milling Company was incorporated (Tr. p. 440). Its articles of incorporation are set out at Transcript pages 371 et seq. For aught that appears Big Blackfoot Milling Company is still in existence, plaintiff having put in evidence (Tr. p. 375) certificate of extension of term of existence of this company, showing statutory proceedings taken to that end in July, 1908.

Upon the organization of Big Blackfoot Milling Company in November, 1891, W. H. Hammond became its president and manager and the books of the company were kept at Bonner. Before the formation of Blackfoot Milling & Manufacturing Company and while W. H. Hammond not only operated *but owned*, on his individual account, the Blackfoot Mill, a man by the name of Winstanley kept the books at Missoula. This was from 1885 to 1888 and W. H. Hammond paid Winstanley for his services. Upon the formation of Blackfoot Milling & Manufacturing Company and W. H. Hammond taking a lease on the plant from that Company, the books of Blackfoot Milling & Manufacturing Company were kept at Missoula (Blackfoot Milling & Manufacturing Company had other operations—A. B. Hammond, Tr. p. 660; G. W. Fenwick, Tr. p. 595; besides the mere receipt



of rent for the Bonner Mill property) and W. H. Hammond's books containing the accounts of his operations under the lease were kept at Bonner by a man named Young (Tr. p. 440). W. H. Hammond owned about one-fourth of the stock of Big Blackfoot Milling & Manufacturing Company and was paid a salary of two hundred dollars a month. While operating as lessee, of course, he received no salary (Tr. p. 441). Complete disassociation in every sense of defendant from this Blackfoot or Bonner mill operation, and the logging incident thereto, from its inception until it was sold out to Anaconda Copper Mining Company, in 1898, is conclusively evidenced by the testimony set forth at Transcript pages 441-2.

From the inception of the Bonner lumber enterprise and during all the times mentioned in the complaint a merchandise store was run by W. H. Hammond at Bonner and after Big Blackfoot Milling Company was incorporated there was also a flour mill. The goods for the merchandise store were bought from Missoula Mercantile Company (Tr. p. 471). While W. H. Hammond operated and also owned the Bonner plant and at the time he transferred the plant to Blackfoot Milling & Manufacturing Company and took a lease therefrom W. H. Hammond owned teams and logging equipment which were used in his logging operations on the Blackfoot. On his sale of the plant to Blackfoot Milling & Manufacturing Company he retained his teams and logging equipment (seventy-five or eighty teams with their equipment and the logs that were on the bank of the river). He continued while running the plant

under the lease to operate his teams and logging equipment, but gradually abandoned this method of operation and contracted for his logs, disposing of his teams from time to time as he could. The proceeds of the teams came to him and neither defendant, nor Missoula Mercantile Company, shared in the proceeds. Blackfoot Milling & Manufacturing never furnished him with teams and never engaged in logging on the Blackfoot River (Tr. pp. 471-3).

The occasion for organization of Big Blackfoot Milling Company to take the place of Blackfoot Milling & Manufacturing Company seems among other reasons to have been to bring about a division of the stock into first and second preferred and common stock (Tr. p. 476). Some of the stockholders are enumerated at page 484.

Besides the credit which W. H. Hammond received from Missoula Mercantile Company Marcus Daly, of the Anaconda Mining Company, furnished him with capital for the operation of his mill, at various times fifty thousand dollars, and a man by the name of Walker once loaned him fifty thousand dollars (Tr. p. 485).

Defendant corroborates the testimony of W. H. Hammond as to the interests operating the Bonner Mill from time to time, W. H. Hammond's ownership, the two corporations and the lease, and definitely establishes his (A. B. Hammond's) relation to the enterprise (Tr. p. 661). During the period involved in the complaint defendant was twice up the Blackfoot. Once in the spring of 1886 he went up out of curiosity to

see the log drive—renewing his boyhood acquaintance with such operations as he had seen them on the Penobscot—and in 1888 when he was on a hunting and fishing expedition (Tr. pp. 665-6). Defendant never gave any directions or orders to any one with regard to operations on the Blackfoot (Tr. p. 666).

Defendant testifies that he did not know at any time as to the particular sections either Big Blackfoot Milling Company, or, prior to its organization, W. H. Hammond was cutting timber from on the Blackfoot and he enumerates specifically a lack of knowledge as to timber alleged to have come from the Edgar claim, the land embraced in the Boyd trespass and that cut supposedly under the sanction of the Timber Permit (Tr. pp. 680-1).

The government witness, Hathaway, gave the same version about the Bonner enterprise. How W. H. Hammond sold his mill to Blackfoot Milling & Manufacturing Company and took a lease and then operated the mill and “Whatever he could make out of the mill was his over and above what he paid for the lease” (Tr. p. 207). And again: “He took his chances when he paid his rent” (Tr. pp. 211-12). This witness described W. H. Hammond as being “a man of means when he initiated the Bonner enterprise” (Tr. p. 206). The government witness McCulloch also testified to the *bona fides* of the lease of the Bonner plant to W. H. Hammond (Tr. pp. 178-9, 182).

Scattered everywhere throughout the record is conclusive evidence of the exclusive dominion, direction and control of this Bonner enterprise by W. H. Hammond.

For instance, the government witness, John Cunningham (Tr. p. 266) worked as a logger on a salary from 1886 to 1888. From 1891 to 1897 he "contracted", that is to say, he would enter into a contract with W. H. Hammond to cut over certain territory and bank logs on the river for so much money. During the years he worked in the Blackfoot country he was paid from three dollars to four dollars a thousand feet for this service, that is for taking the log from the stump and banking it on the river. During the entire time he was under the direction and management of W. H. Hammond (Tr. p. 270). The same is true of government witness, McNamara, also a logger (Tr. pp. 278-80) who also testifies to the strictness of W. H. Hammond's directions to cut within the lines blazed out for them (Tr. p. 280). To the same effect is the testimony of the Government witness, J. B. Seely (Tr. p. 183), who worked off and on as a logger from 1885 until 1889. He says (Tr. p. 187) that "A. B. Hammond did not at any time have any connection with the logging operations that were being conducted on the Blackfoot while I was there". The Government witness, Mitchell (Tr. p. 103) never saw A. B. Hammond on any of the lands the company was cutting in the Blackfoot country. Pat Hayes (Tr. p. 499), now a successful farmer and member of the Board of Trustees of the Missoula County High School, worked as a logger for W. H. Hammond, between 1886 and 1888 (Tr. p. 502). When Hayes was working up the Blackfoot A. B. Hammond was never around there. "He had nothing to do with it. It was all Henry Hammond. All I knew of the



operations in the Blackfoot was Henry Hammond. He was the head push of them all. Directed all operations and cutting up there" (Tr. p. 503).

William Boyd, now a prosperous farmer, testified to the same effect. He commenced working for W. H. Hammond in 1888 and worked for him nine or ten winters. He says: "I never did any business with A. B. Hammond at all; never asked me any questions at all" (Tr. p. 52). To the same effect is the testimony of Malloch who was employed at the Bonner plant from 1888 to 1893 (Tr. pp. 520, 522).

In general, as to the alleged trespasses on the Blackfoot which involved some seven claims, there was only one, "the Kelly Claim" comprising the Northwest quarter of Section 18-13-14, as to which there was any conflict in the evidence concerning whether cutting had been done before or after the inception of the settlers' title. Any impartial tribunal must have reached the conclusion that the timber was cut off that claim subsequent to the inception of title in Kelly, August 24, 1894 (Tr. p. 744). The Government claimed 1,707,420 feet had been taken from this claim.

As against the positive testimony of three or four witnesses directly connected with the purchasing, cruising and cutting of the claim subsequent to 1895, there was, however, one witness who maintained that the claim had been cut in 1891 and this in spite of the fact that the claim was taken up subsequently as "Timber and

Stone'' entry. A strange idea to take up as a timber claim what had already been denuded of timber. As to the Edgar Claim, the so-called Boyd trespass and the trespass under the supposed sanction of the Timber Permit, which have already been adverted to (*supra*) different considerations are applicable, but of the rest of the claims involved they either were not cut until long after the Anaconda Copper Mining Company purchased the Big Blackfoot Milling Company, or else were cut by W. H. Hammond or Big Blackfoot Milling Company, as the case may be, long after the Government had parted with title. Had defendant requested of the Court a series of instructions that as to each of these claims there was no evidence to show a taking of the timber therefrom at a time prior to the divesting of the Government's title and hence that as to each of such claims respectively the jury must find for the defendant, we would be in better shape to review piecemeal the insufficiency of the evidence as to each claim. This unfortunately was not done and we can only advert to the subject now in this general way as bearing upon defendant's alleged participation in these imaginary conversions. It is, of course, impossible for defendant to be liable for a conversion that never was committed. Nevertheless, we do not think it necessary to burden the Court with a review of the evidence as to these several respective claims; suffice it to say that on the Blackfoot, with the exceptions noted, the Court need not concern itself with the defendant's relation to the alleged conversions, for the conversions have not been proved.

(D) *The Missoula Mercantile Company—Defendant's Relation Thereto and Its Relation to G. W. Fenwick, W. H. Hammond, Blackfoot Milling & Manufacturing Company and Big Blackfoot Milling Company.*

As we have seen, Missoula Mercantile Company was organized in August, 1885, to take over the merchandise business of Eddy-Hammond & Co. There is a compilation showing the personnel of the stockholders of this company as it existed from time to time from its incorporation until the year 1898 (Tr. pp. 295-6) and the Minute Book of this concern from the time of its incorporation until September 8, 1894; is contained in Transcript pages 297 to 370. These documents were put in evidence by plaintiff. For what purpose we know not, for they afford convincing proof that Missoula Mercantile Company was by no means just another name for the defendant, A. B. Hammond. The fact appears conclusively that he held but a fraction of the shares of stock; that there was a regular corporate organization and that he was but one of its guiding spirits. If there be anything in all this which furnishes any comfort to the plaintiff in this case it will have to be pointed out to us. It is worthy of note that G. W. Fenwick, W. H. Hammond, Montana Improvement Company and Blackfoot Milling & Manufacturing Company were not stockholders of Missoula Mercantile Company. Big Blackfoot Milling Company was not a stockholder in Missoula Mercantile Company, save that in February, 1892, and thereafter it appears to have owned twenty-two shares of second preferred

stock of Missoula Mercantile Company. As was explained (Tr. p. 664) this came through a bad debt due to W. H. Hammond from one Ross who owned these shares in Missoula Mercantile Company for lumber purchased by Ross from Hammond. When Big Blackfoot Milling Company was organized and W. H. Hammond adjusted the transactions that had arisen while he operated the mill as lessee of Blackfoot Milling & Manufacturing Company these shares were turned over to Big Blackfoot Milling Company by W. H. Hammond—the former paying the latter therefor. To the same effect is the testimony of W. H. Hammond.

It elsewhere appears that Missoula Mercantile Company did not own any shares of stock in Blackfoot Milling & Manufacturing Company or Big Blackfoot Milling Company (Tr. p. 293).

It further appears from the record that Missoula Mercantile Company is today a subsisting and active corporation (see deposition of C. H. McLeod, at present president of said corporation, Tr. p. 285).

From an examination of the list of stockholders of Missoula Mercantile Company it appears that at the time of the incorporation of Missoula Mercantile Company defendant, A. B. Hammond, owned a third of that company. His interest fluctuated from time to time during the period involved in the complaint, but at no time did he control the company. As the owner of an equal share, namely, a one-third in the partnership of Eddy-Hammond & Co., he acquired a one-third of Missoula Mercantile Company. The transaction is open



and above board and is set out in full in the Minutes of Missoula Mercantile Company.

The stockholders of Blackfoot Milling & Manufacturing Company and Big Blackfoot Milling Company are named at pages 662-3 of the testimony. Defendant had about 20% of the stock in each of these companies, and it will be observed that there were many stockholders in the Missoula Mercantile Company who were not stockholders in these other companies. For the names of stockholders in the two Blackfoot Companies see testimony W. H. Hammond (Tr. p. 484) and G. W. Fenwick (Tr. 573).

An examination of the divergent personnel of the stockholders in the two Blackfoot Companies and the Missoula Mercantile Company furnishes conclusive evidence that each of these companies must in truth have been a separate corporation, run for its own profit and not for the profit of each other—much less of the defendant, A. B. Hammond, who was but a minority stockholder in all of them.

Defendant describes just what part he took in the direction of the affairs of Missoula Mercantile Company (Tr. pp. 688-90). In 1885, 1886, 1887, defendant was actively engaged in building railroads in Montana and gave up most of his time to that business, all of which he describes in detail (Tr. p. 692). He lived in Oakland, California, from 1890 until 1892, with his family, visiting Montana from time to time (Tr. p. 691). In fact defendant testifies that since 1888 he has not been active in any business in Montana (Tr. p. 706), at which time he disposed of his residence there

and has not attended to details of business since that date in that state (Tr. p. 706).

(E) *Specific acts or circumstances seemingly relied upon by the Government as evidencing Defendant's direction or control of the persons or corporations committing the alleged conversion.*

**1. The relationship by marriage and by blood of the defendant to many of the persons in the transactions disclosed by the evidence.**

George Hammond, Fred A. Hammond (both deceased) and W. H. Hammond were the defendant's brothers. G. W. Fenwick was his brother-in-law. John Hammond—a scaler employed by W. H. Hammond on the Black-foot was a “double first” cousin—that is to say, John Hammond's parents were respectively brother and sister of defendant's parents. The Court laid special emphasis on this feature of the case, instructing the jury that they “might consider the relationship, if any, by blood, marriage or otherwise, shown to exist between the defendant and those immediately employed or engaged in the mills and logging camps”.

We would suggest that relationship, by marriage or blood, if it ever means much, is of small, if any, consequence here. Had defendant owned a larger share in these enterprises than he did there might be more reason for the inference insinuated by the Court. He would hardly be likely to “use” these relatives to do unlawful acts for which they might be subject to severe penalties where his interest in the indirect fruits of the wrong doing could, on no theory, exceed 20 or 25%.

To our way of thinking the fact that G. W. Fenwick, W. H. Hammond and Fred Hammond were thus closely related to defendant permits only of the legitimate inference that defendant never dreamed for an instant that these parties were doing anything that might be even in the twilight zone of illegality. Is not the testimony of the government witness, Hathaway (Tr. p. 240) more to the point?

“I don’t know of my own knowledge whether or not A. B. Hammond and Henry Hammond supervised or controlled the operations of the Bonita Mill when it was owned by George W. Fenwick. I believe that A. B. Hammond wanted to help his relatives and that certainly when Fenwick was there, whatever Fenwick would make, it would be a pleasure to him. That is my honest, candid conviction. Further I do not know \* \* \* I think he wanted Fenwick to make something. It was always his way of doing business, to put his relatives in and give them positions where he could assist them in any way he could. I naturally suppose he did that to Fenwick in this case. I think really he helped Fenwick to acquire that mill. Fenwick can tell you about that better than I can”.

It would certainly be a strange way of helping a relative to encourage him in a course of conduct which one knew to be unlawful and particularly when the offended party is so formidable, favored, persistent and immortal an antagonist as is the United States.

**2. The extension of credit by Missoula Mercantile Company to the persons or corporations committing the alleged conversions.**

We have quoted herein defendant’s description of the way in which business was handled in western Montana

in the early days of Eddy-Hammond & Co., and which persisted throughout the period named in the complaint, when Missoula Mercantile Company had succeeded to the business of that co-partnership. So far as George W. Fenwick and W. H. Hammond's activities are concerned we have already seen that they had other sources of credit and financial assistance than Missoula Mercantile Company.

The witness, Keith (Tr. p. 420) who had charge of the office of Missoula Mercantile Company, describes the transactions between these men and Missoula Mercantile Company and how orders would be drawn by them on the company to pay wages of their employees. Other lumber companies were doing business the same way with Missoula Mercantile Company (Tr. pp. 421-22). It will be noted particularly that this form of accommodation was not confined to lumbermen. It extended to farmers, trappers, traders, contractors and other customers generally (Tr. pp. 641, et seq.). Some customers carried larger accounts than did G. W. Fenwick and others less—customers which it is not pretended had anything to do with either A. B. Hammond or Missoula Mercantile Company. An instance was cited where Missoula Mercantile Company carried a man to the extent of thirty or forty thousand dollars, and in this connection the <sup>witness</sup> ~~plaintiff~~ stated that he thought it was true of many of the enterprises of those days that they could not have been carried on without the extension of credit by Missoula Mercantile Company (Tr. p. 424). Witness could not say that, however, as to the case of George W. Fenwick owing to the ar-



rangement that Fenwick had with Marcus Daly (Tr. p. 425). The limited banking facilities at that time of Missoula are set forth at page 427 and so far as this question of extension of credit by Missoula Mercantile Company is concerned it can best be summarized in the language of the witness (Tr. p. 428):

“It endeavored to get hold of the accounts of these mill men and have them buy their supplies at the Missoula Mercantile Company and have them give their orders on it, and the Missoula Mercantile Company carried as many accounts as it could secure. It was the aim and object of Missoula Mercantile Company, during that time, to make itself the banker as well as the merchant for these little companies in the interest of its business, and I think it is quite true that many of them could not have run if they had not done it”.

In general the testimony of C. H. McLeod is to the same effect; also that of Hathaway.

No reasonable man will question the fact that this method of doing business assisted in the development of the wilderness and the upbuilding of a pioneer country.

### **3. The lumber office in Missoula.**

Plaintiff seemed to lay great stress on the fact that some of the mills maintained a lumber office in Missoula in close proximity to the office of Missoula Mercantile Company, but there is no sinister significance in this fact. As we have seen, when Mr. Bonner came to reside in Missoula and it was decided to liquidate Montana Improvement Company its office was moved from Deer Lodge to Missoula. The Government witness, Hathaway, testified (Tr. p. 215) that the office of Mon-

tana Improvement Company was located in a portion of what is now the office of Missoula Mercantile Company. Winstanley, now dead, was in charge of the books. The office had a separate stair-way and entrance. Montana Improvement Company while it ceased to do any new business had on hand a lot of old lumber which it took many years to sell (Tr. p. 228). Hathaway thinks his services as salesman and general manager of Montana Improvement Company ended in 1887, when he was employed in connection with building the Bitter Root Railroad and had a contract in connection with it (Tr. p. 240).

On this subject Fenwick testified (Tr. p. 556) that the office was upstairs over the office of Missoula Mercantile Company, a separate and distinct office for the lumber interests. His mill was located where there was no postoffice, no safe, no place to keep any records and he could not send his invoices out. He arranged with Winstanley to do the necessary clerical work in connection with the books. He reported his shipments to Winstanley and Winstanley would make the proper entry and proper charge and send the invoice to the party receiving the lumber, Anaconda Mining Company. Fenwick paid Winstanley for his services.

Again (Tr. pp. 592-3) he testifies the checks came to him at his address in Missoula, parties receiving credit for the checks before anything else was done with them. They were then turned over to the Missoula Mercantile Company in payment of his bills and placed to his credit. The details of his business with Mr. Daly were just the same as with other people.

Mitchell (Tr. pp. 94-6; 101-2) who for a while was at Bonita and for a while was assistant to Winstanley in Missoula gave evidence in corroboration of the foregoing. He testified that each mill had a separate set of books.

W. H. Hammond's relation to the lumber office in Missoula has already been considered under the topic of the Bonner Mill.

**4. Defendant's participation in sending East to bring out laborers and in notifying laborers at what mills they would find work.**

Government witness, Hathaway, made two trips East to Minnesota to bring out laborers. He thinks these trips were made in 1886 and 1887 and as to the first trip he got his instructions from defendant. The first batch of men went to work at a mill owned by Haycock (in which it is not pretended that defendant, or any of the companies mentioned, had any interest) where there had been a strike. Afterwards some of these men went to the Bonner or Bonita Mill (Tr. pp. 239-40). The bringing in of these laborers was necessary for the development of the country. Hathaway brought out pretty nearly three hundred of them. Lots of these men found employment in other places besides the Bonita and Bonner mills. Some found employment in the store, but the main body of the men brought out by Hathaway were lumbermen, lumberjacks (Tr. p. 242).

Defendant testifies (Tr. p. 673) that he remembers Hathaway going East. Defendant wanted lumbermen in

the Bitter Root Valley. W. H. Hammond was short of men, so was Fenwick, Greenough & Haycock, and the expense of sending Hathaway there was borne pro rata by the parties who got the men. Fenwick's testimony is to the same effect (Tr. p. 567) and so we find numerous instances brought out by plaintiff of so-called employment by defendant and we suppose these must be reviewed and the facts presented in their proper light.

Thus witness Van Keuren (Tr. p. 149) testified that in the fall of 1885 Hathaway ran across him in Idaho and asked him to go to work for the company. He came to Missoula and was introduced to defendant, who told him to go to Wallace and mentioned what the wages were that were being paid, giving him a letter to Henry Hammond, who the witness testified seemed to be "the push" up there. On going there he found they were full handed and Henry Hammond sent him to Bonita, where he got work.

In reference to this incident defendant testifies (Tr. p. 671) that he did not remember, but that it was quite possible he had sent Van Keuren to Wallace as Van Keuren testified, for whenever Henry Hammond wanted men he would telephone down and the defendant, or someone else, would attend to it.

Here it is well to explain in the language of defendant one of the many functions of the general country store in those early days:

"Concerning what has been said in this case about the employment of men and the sending of men to different places for employment, a good many of the mills were situated at places where



there were no postoffices and at some of them there were no stations. When they wanted men they would send down to Missoula, send word, and we would send them up. That applied to farmers and stockmen, as well as lumbermen. A farmer came in from the country who had a ranch fifteen or twenty miles away, and he wanted a teamster, or a man who could run a threshing machine or a mowing machine, or a self-binder, or a man who could milk cows, and he was very apt to leave word with us if such a man came to Missoula that wanted such a job to send him up to him. The Eddy-Hammond & Company and the Missoula Mercantile Company did a lot of that business. That applies also to graders, and it applied to my work in the building of the Bitter Root road—my sub-contractors as well, and I furnished them with men and I sent to Utah and brought men out from that country for graders. We had little mills on the Bitter Root road and we had to have lumbermen to run them and we combined with other people who had mills and sent East and elsewhere to get lumbermen. When those men came to the country they came to Missoula, and if they were connected with the people that we sent to bring them there; why, we found out and we knew where we wanted men and we told them where to go.”

According to the same witness defendant was guilty of selling him two horses. What the witness says on this subject and the defendant's comments thereon are set forth in the Transcript, pages 673-675.

Government witness, John Cunningham, was one of the men hired by Hathaway in Minneapolis in 1886. When he came to Missoula he went to the store of Missoula Mercantile Company and Jack Keith was there. He told him to see A. B. Hammond and A. B. Hammond told Cunningham and those with him to go up the

Blackfoot River and take a team he wanted to send up. When he got up to the camp on the Blackfoot River George Hammond put him to work (Tr. p. 275).

Defendant's comment on this incident, if deemed of interest by the Court, will be found in Transcript pages 675-6.

The witness, William Harley, testified that A. B. Hammond recommended him to Fenwick as a logger. Just what his testimony is in this behalf and the defendant's comments in relation thereto will be found at Transcript page 676.

The witness, Milton Hammond (Tr. pp. 140, 145-7) had a somewhat similar experience in reference to employment and bringing others out West. He was a remote cousin of the defendant and had corresponded with defendant about coming West. Milton Hammond's testimony and the defendant's comments in relation thereto will be found at Transcript pages 677-679. More significant possibly is the testimony of this witness that all the time he was on the Blackfoot he never saw A. B. Hammond there. He saw him at the Bonner Mill when A. B. Hammond was there on a kind of picnic or excursion. He never had any conversation in the Missoula Mercantile Company's store with defendant about the cutting of lumber.

The witness, William Greene, testified (Tr. p. 80) that he was employed to work in the Blackfoot country. He testified (Tr. pp. 83-84) that A. B. Hammond on the sidewalk in Missoula in response to the witness' question whether any more men were wanted in the

woods said that there were. A. B. Hammond took the witness' name down and he was told to go to Headquarters Camp on the Blackfoot River and George Hammond directed him to go to work. A. B. Hammond merely told him men were needed.

**5. Miscellaneous acts of defendant which it is claimed indicate his connection with the alleged conversions.**

The witness, R. K. McLaughlin (Tr. p. 86), employed as a logger on the Blackfoot in 1888-89, testified (Tr. p. 88) that practically all his business was with Henry Hammond and George Hammond. He saw A. B. Hammond once on the Blackfoot (Tr. p. 89). He testified that once in a while he had some talk with A. B. Hammond (Tr. p. 87), but A. B. Hammond never told him to go into the woods or where to log or haul (Tr. p. 89). He further testified that he brought to Missoula for sale some horses at the direction of George Hammond, which had been used in logging on the Blackfoot and that he had a conversation with A. B. Hammond in Missoula concerning same; that A. B. Hammond set the price on the horses (Tr. p. 92), but that he did not know whether A. B. Hammond was acting for himself individually, the company or W. H. Hammond. If the details of this horse transaction be of interest to the Court, McLaughlin's story will be found on pages 88-92 and the defendant's comments thereon at Transcript pages 680-81.

The Government witness, Felix Cyr (Tr. p. 109) lived in the vicinity of Bonita off and on since the year 1885. This witness testified that he saw A. B.

Hammond during the time the Bonita Mill was running in and about the mill and that on one occasion he received instructions from defendant described by the witness (Tr. p. 110) as follows:

“One time I was working there that first fall and my dad was working there with a team. My dad was supposed to be driving a team, but I was driving; I was fifteen years old then. A. B. Hammond came up. He said to me, where is your dad? I said he is over home. He said, you better go back and tell him to drive his own team, you are too small.”

The witness further testified (Tr. p. 111) that defendant did not give him instructions that there was a boss there taking charge of the camp and that defendant used to go there once a month, or off and on.

The witness further testified (Tr. p. 112) as follows:

“As to my understanding that Mr. A. B. Hammond was the head man—I told you the way it is. Suppose we worked for a business and they say it is Hammond’s sawmill. When we got pay we went down to Hammond’s office to get pay; I always thought it was Hammond’s mill. That is all I know about it.”

The witness was given a time check at Bonita which he cashed at the Missoula Mercantile Company’s store through Jack Keith, who was cashier in those days (Tr. p. 112).

Concerning this incident defendant testified (Tr. pp. 666-7) that he knew a boy of this name and he knew Dumas, his father, and he knew the latter down East. He does not recall the incident mentioned by the wit-



ness, Cyr, but states it may have occurred; that he may have made use of such an expression as a pleasantry; he testified that he never gave any orders to any persons about any transactions in connection with the logging operations at the Bonita Mill.

The Government witness, William A. Cook, was at great pains to explain a fuss which the defendant had with one George Rich (Tr. pp. 131-2). We do not think it necessary to weary the Court with the details of this fuss. Cook's testimony in reference thereto is set out at Transcript pages 131 et seq. and the defendant's comments thereon follow in at pages 669, 70 and 71.

In a word it may be said that defendant representing Eddy-Hammond & Company, or E. L. Bonner & Company, had some difficulty with Rich in 1884 about some piles which he was to have furnished in connection with the Northern Pacific Railroad contract. He did not have any controversy with him at any time about any logs for the Bonita Mill and the dispute in question occurred a year before the Bonita Mill existed, hence the incident narrated by Cook is of no significance as showing any direction or control by defendant over the logging operations of Fred Hammond, or G. W. Fenwick, in connection with the Bonita plant.

Government witness, Pat Joyce, who was a logger on the Blackfoot in 1886 working for George Hammond at Fish Creek Camp, testified (Tr. p. 159) that he saw defendant on the log drive there; that defendant came to where they were driving:

“I heard a conversation between A. B. Hammond and George Hammond at that time—made it public to the men. At that time there was quite a few quitting and discharged, and they were short handed there, and A. B. Hammond came up there and he finally told George Hammond that the next man that would go down he, that is George Hammond, would go down too.”

He testified that defendant was not very long in and about Fish Creek Camp at the time of this conversation with George Hammond and that that was the only occasion on which he saw defendant up the Blackfoot.

Defendant knew of Pat Joyce and denied ever saying such a thing to George Hammond, who was his older brother, and that at the time he did attend the drive on the Blackfoot he had no interest of any kind in any of the operations that were being conducted on the Blackfoot; that George L. Hammond was neither directly or indirectly in the employ of defendant in any capacity (Tr. pp. 665-6).

If on this appeal we are compelled to accept the word of Pat Joyce as against that of defendant, what then is the legal significance of the conversation reported by Pat Joyce? It has been freely conceded that defendant as an employee of the country store kept in touch with the matter of the supply of labor to the industries centering around Missoula. The remark is susceptible of the construction, indeed, Pat Joyce admits, that there was a scarcity of labor and it may well have been that if any more laborers left the Blackfoot there would be none coming up from Missoula to take their places and that George Hammond would have to come down

and take this responsibility on himself—the conversation does not say where—presumably to Missoula and the object in his coming down might well be based on several different reasons. In the first place, if the work had to be abandoned for lack of laborers there would be no occasion for George Hammond remaining there as foreman; in the second place, he might have to come down to scour the country for those laborers which were not apparently reporting for jobs at the office of the Missoula Mercantile Company, and in the third place, it might have been merely a suggestion that he, George Hammond, go down to W. H. Hammond at Bonner and explain to him what was the trouble. It is certainly pushing the import of the conversation to a limit which it does not warrant to find in that conversation evidence that defendant was exercising such authority as amounted to the control and direction of the whole Blackfoot operation.

Michael J. Haley (Tr. p. 163) had been a special agent of the General Land Office in Montana from 1884 to 1892. Incidentally he made two examinations two years apart around 1886 and 1888 of the Edgar Claim, estimating the amount of timber that had been taken therefrom, which will be referred to later. He testified (Tr. pp. 167-8) that he had a conversation with defendant about the general cutting up and down the Blackfoot River (doesn't know whether the cutting on the Edgar Claim was specifically mentioned) and defendant took the position that they were cutting within legal bounds. Haley talked with defendant about it two or three times, perhaps more.

“Q. Did Mr. Hammond or did he not assume to be in control or have anything to do with that cutting that was then going on on the Blackfoot River?

A. He let me know that he was the head of the whole thing.

Cross-Examination.

Q. What did Mr. Hammond say to you?

A. I do not remember what he said, but the impression he gave me was that he was the—that it belonged to the Company. That is the impression I have now and that was told me twenty-five years ago.”

Summarized, this simply means that special agent Haley got the impression from defendant that “the company” (whatever company it may have been—the date is not given as to when these conversations took place) owned the land on which Haley contended some unlawful cutting was taking place or had taken place.

**6. The Helena Lumber Yard and defendant's relation thereto and the source from which its lumber came.**

As we have seen, the lumber yard at Helena owned by Montana Improvement Company was in the fall of 1885 sold to V. H. Coombes. Plaintiff apparently takes the position that this was not a bona fide transfer and that defendant, interested in said yard as a stockholder of Montana Improvement Company, continued to be interested therein, directing and controlling it.

The Government called as a witness Charles T. McCullach (Tr. p. 170), who was employed by Helena Lumber Company in 1888 and which had succeeded W. H. Coombes in the ownership of said yard at Helena.



McCullach was employed as bookkeeper. He was there just one season. While he was working there he saw the defendant there and apparently he was looking over the business in a general way. Defendant had access to the books, if there was anything came up that he wanted to know (Tr. pp. 171-2). Witness did not know whether defendant owned any stock in the company (Tr. p. 173). V. H. Coombes was president and a man called Cameron secretary. The manager of the planing mill connected with the yard, named Gunter, claimed that he owned \$2500.00 worth of stock in the company; so did another man named Hoskins. So far as the witness knew neither Missoula Mercantile Company, nor Eddy-Hammond & Co., nor Montana Improvement Company were stockholders. He stated W. H. Hammond was connected with the company—the same W. H. Hammond who was at the Bonner Mill. Witness did not know of any shipments being received from the Bonita Mill (Tr. p. 174) and their instructions were to use everything they could from the Bonner Mill. He testified that defendant was not an officer of the corporation, but was recognized as the general financier of the company. He states defendant did not come to Helena very often and witness could not state that he saw him there more than five or six times. The company handled other commodities besides lumber, namely, coal and lime and possibly building paper (Tr. pp. 175-6). The only conversation witness could recollect with defendant was concerning matters that had taken place before the witness was there employed and he recalled particularly that defendant inquired concerning the condition of the

security as to small stockholders in Helena Lumber Company who had bought their stock on credit and witness could not give him the desired information, as it was a transaction occurring before his time (Tr. p. 176).

Defendant testified (Tr. p. 682) that he was connected with the ownership of quite a large amount of land around the Helena depot and in the section where the Helena lumber yard was situated; that Helena Lumber Company took the contract to erect small buildings thereon and defendant used to go to Helena on this and business connected with railroad operations that he was carrying on. When he did visit Helena he naturally would look over this real estate and visit the Helena Lumber Company's office. When Montana Improvement Company sold to Coombes it was a sale largely on credit and when Helena Lumber Company was formed it assumed the indebtedness of Coombes to Montana Improvement Company. Defendant states he might have made the inquiry testified to by McCullach as to whether the stockholders who had subscribed for stock in Helena Lumber Company had paid in their subscriptions, though he has no recollection thereof. However, Montana Improvement Company was in liquidation at the time and dependent upon the sale of its properties that it had made for part cash and part credit to pay its obligations, and as a stockholder in Montana Improvement Company defendant was interested in knowing how its creditors were getting along. He denies having any interest of any kind or character in the Helena Lumber Yard. Witness further testified

that he did not have to do directly with the collecting of the assets of Montana Improvement Company, but he was interested in the collecting of its assets and seeing the accounts paid (Tr. p. 683).

There is nothing in the testimony of Hathaway contradictory to the foregoing. McCullach (Tr. p. 172) states that Hathaway was present at the Helena Lumber Yards during part of the time he, McCullach, was working there and that McCullach always recognized him as an auditor, but he acted also in the capacity of a salesman, a general adviser.

**7. The sale of Big Blackfoot Milling Company to Marcus Daly, or the Anaconda Copper Mining Company.**

Plaintiff endeavored to establish that defendant exercised such control in consummating this sale as to indicate, at least, his dominance generally in the affairs of Big Blackfoot Milling Company and there may be other inferences supposedly adverse to defendant claimed by plaintiff as legitimately arising from this situation, but we do not know what they are. Anyhow these are the facts:

In 1898 (the conversions in this case are not claimed in the complaint to have been committed subsequent to January 1, 1895, and the Government's testimony does not show the severance of any timber subsequent to 1891) Marcus Daly of the Anaconda Copper Mining Company purchased all the shares of stock of Big Blackfoot Milling Company. The witness, G. W. Fenwick, names the stockholders and the amounts realized by some of them from this sale

(Tr. p. 573). He further testifies (Tr. p. 579) that the early negotiations for the sale of the property were conducted between W. H. Hammond and Thomas Hathaway on the one hand and a representative of Marcus Daly on the other hand, and he thinks that the final closing of the negotiations was accomplished by the parties mentioned, together with the defendant. Defendant was made a trustee for winding up the business, but whether or not he was made a trustee for the purposes of the sale Fenwick does not recollect. He thinks the stock was put in escrow in a bank for Daly. The sale netted about \$1,100,000 (Tr. p. 580).

W. H. Hammond, who was president of Big Blackfoot Milling Company from its organization until the time of its sale to Daly was of the opinion (Tr. pp. 476-7) that defendant was appointed sole trustee for all of the stock of Big Blackfoot Milling Company to negotiate a transfer of his interest and the interest of his associates to Daly; that defendant did not alone conduct these negotiations. The witness and Hathaway had something to say about it. Witness further testifies (Tr. p. 484) that he received something over two hundred and fifty thousand dollars for his shares and that defendant had no interest in, nor did he receive any part or portion of this money.

Defendant testified (Tr. p. 693) that he does not think he was appointed trustee by the stockholders or that all of the stock was placed in his name to consummate the sale to Daly. His recollection accords with Fenwick's that the stock was deposited in escrow in the bank, but he does not remember positively. He does remember



that it was not transferred to him and that he deposited his stock like any other stockholder in escrow and Daly paid for the stock and took it over and the purchase price was not paid over to defendant. Defendant admits (Tr. p. 694) that as a stockholder—the evidence showing that he held about 20% of the stock, roughly the same amount as held by his brother, W. H. Hammond—he would have been drawn into these negotiations anyhow; that they would not have sold without the consent of all the stockholders, but in addition to that, defendant individually owned some thirty-five hundred or four thousand acres of timber land on Nine Mile Prairie, about thirty miles west of the Blackfoot River and Marcus Daly did not want to buy out Big Blackfoot Milling Company unless he could get these timber lands to use in conjunction with a lumber mill which Daly or the Anaconda Company had down in that locality. Defendant does not recall how much he received out of the sale of his Big Blackfoot Milling Company stock to Mr. Daly, but he received several hundred thousand dollars for his holdings on Nine Mile Prairie.

#### 8. Tax Assessments.

Over the objection of defendant, which will be later considered, the tax assessment of Missoula Mercantile Company for several years was admitted in evidence. Assuming for present purposes that these tax assessments were properly admissible, evidence which neutralizes absolutely the inferences that might flow therefrom was introduced and must here be considered. In short, it appears that for purposes of convenience in handling

the payment of taxes it was customary to assess to Missoula Mercantile Company a number of properties which admittedly it did not own, or have any interest in. At transcript pages 404-408 will be found excerpts from the tax assessment of Missoula Mercantile Company for the years 1890 to 1895, each inclusive. These assessment rolls showed that Bonner Mill was assessed to Missoula Mercantile Company throughout these years and that in 1890, 6,750,000 feet of lumber and 4,000,000 feet of logs were also assessed to Missoula Mercantile Company.

Defendant testified (Tr. pp. 683-5) that he had never authorized or directed nor was he ever present at any meeting of the board of directors of Missoula Mercantile Company which authorized or directed that company to return to the assessor any property; that he never authorized any person to make return of the Blackfoot Milling & Manufacturing Company's property or the Big Blackfoot Milling Company's property to the assessor either in the name of Missoula Mercantile Company, or any other name.

In the assessment rolls there was specific property described and assessed to Missoula Mercantile Company which defendant testified did not belong to Missoula Mercantile Company, such as the residence of Col. Eddy and E. L. Bonner and several lumber mills in the Bitter Root Valley; also the Florence Hotel and Eddy Block, which belonged to Missoula Real Estate Association. Defendant had no personal knowledge of how it was that these different properties not belonging

to the Missoula Mercantile Company happened to be assessed to it.

In connection with the testimony of W. H. Hammond defendant offered in evidence (Tr. pp. 487 to 490) assessment book setting forth the assessment of W. H. Hammond for the years 1886, 1887 and 1888, which showed the assessment to W. H. Hammond of the Bonner plant and equipment for those years. The witness, W. H. Hammond, also testified in reference to certain of the assessment rolls of the Missoula Mercantile Company offered in evidence by plaintiff, that the Missoula Mercantile Company did not own or have any interest nor did defendant, in two houses, one his residence which in the years 1894 and 1895 had been assessed to Missoula Mercantile Company. The witness did not know how it came about that this property of his was assessed to Missoula Mercantile Company. He told Gust Moser, who was secretary of Missoula Mercantile Company, and Big Blackfoot Milling Company, to take care of his, the witness' taxes and the witness supposed that Moser for his own convenience listed the property that way. Further explanation will be found at transcript, page 490.

In connection with the testimony of G. W. Fenwick, defendant also offered in evidence the assessment rolls for the taxes on the Bonita operations which were assessed to Fenwick for the years 1886 to 1891 inclusive. These will be found at transcript, pages 600-601.

C. H. McLeod, the present president of Missoula Mercantile Company, called as a witness on behalf of

defendant, testified by deposition (Tr. pp. 285, 290) that Missoula Mercantile Company never had any interest in the Bonner Mill, nor did he remember it ever at any time owning any saw mill, or having any interest in any saw mill in the State of Montana; he did not know whether Missoula Mercantile Company ever paid taxes on the Bonner Mill at any time between the years 1885 to 1892 and he did not think Missoula Mercantile Company ever paid any taxes on any other saw mills during the years mentioned. He stated there were different persons in charge of tax matters relating to Missoula Mercantile Company from 1885 to 1892. First of all Jack Keith and then Gust Moser, who became secretary of the company to look after the taxes from 1888 or 1889 to 1895. The witness "supposes" that the assessments were referred to the directors before the taxes were paid but that "they had charge of the assessments and looked after the business, putting in our property, and it was approved by the board of directors, I suppose those things generally are. As a general rule, the assessment list would be finally approved by the board of directors before it was handed to the county assessor."

**(9) The disposition of the lumber manufactured at Bonner and Bonita.**

Plaintiff apparently endeavored to establish an inter-relationship between the several lumber operations and defendant evidenced by the <sup>dis</sup>position of the manufactured product. We do not quite understand wherein the relevancy of this showing would exist, but we shall



proceed to state what was the testimony in relation thereto, particularly as it will cover the point next to be made by us, namely, that the lumber claimed to have been converted was all devoted to mining, manufacturing, agricultural and domestic uses within the meaning of the Acts of March 3, 1891, which we contend gave immunity to all persons concerned with the cutting of the timber involved in this action.

As to the Bonita operation there is no evidence that any lumber was shipped therefrom prior to G. W. Fenwick becoming the owner of this mill. Defendant testified that Montana Improvement Company never operated this mill; that it merely sold the mill, set up, to Fred Hammond (Tr. p. 654). Hathaway testified (Tr. p. 227) that Montana Improvement Company only ran the mill for a very short time—not more than a month or two—and that the lumber cut by it went into the construction of the mill itself, bunk houses and different buildings. Fenwick testified (Tr. p. 568) that while he was operating the Bonita Mill he did not sell any lumber to the Missoula Mercantile Company and that defendant did not, nor did any firm or corporation with which he was connected, purchase any lumber from him (Fenwick). He further testified (Tr. p. 571) that he was a resident of Montana from 1883, when he came there from Canada, until 1900; that he is now a citizen of the United States; that a large part of the timber that he cut at Bonita was utilized in Butte and Anaconda for mining purposes and the remainder of the timber that he cut was used for mining, agricultural and domestic purposes within the State of Montana.

Mitchell, who was at Bonita in 1886, speaking of the shipments of lumber made from there testified (Tr. p. 100) that the lumber that had been cut at that time was not shipped out of the State, but mostly all to the Anaconda Mining Company—either to Butte or to Anaconda. Hathaway at first was under the impression that the product of the Bonita Mill was sold to or handled through Montana Improvement Company (Tr. pp. 201-2); but he corrected this statement (Tr. pp. 209, 230) and testified that the lumber was billed direct to the party who gave the order. Finally (Tr. pp. 242-3) he testified positively that Fred Hammond could not have sold any of the lumber manufactured by him to the Montana Improvement Company and that this is also true of the Bonita product when Fenwick owned and operated that plant. He also testified (Tr. p. 240):

“I never sold any lumber for the Missoula Mercantile Company. The Missoula Mercantile Company to my knowledge never owned—they used to sometimes considerably back—mills, for the sake of trade.”

As to the Bonner product W. H. Hammond testified (Tr. p. 485) that the lumber he cut at this plant was bought by Anaconda Mining Company and that prior to the incorporation of Big Blackfoot Milling Company all of the lumber that was cut by him, or under his direction, was used in the mines and smelters at Butte. The purposes for which the lumber manufactured at Bonner was used in the mines as timber, planking and lagging and building material for building smelters, etc., fences for agricultural use and flooring

of all kinds and material that was used for the construction of houses. Some lumber was sold to the railroad and used for ties and bridges and for all of these purposes the lumber so manufactured defendant used in the State of Montana.

We have already learned that part of the product of the Bonner Mill went to the Helena Lumber Yard, which was a retail yard. The lumber from Bonner, Mitchell testifies (Tr. pp. 104-6) went to the Anaconda Mining Company at Butte, Anaconda Smelting Company at Anaconda and the Great Northern Railway Company at Great Falls, Livingston, Billings, Phillipsburg, Granit and Helena; that all of these places are in the State of Montana.

Lumber also was sold from the Bonner Mill to the yard in Missoula, first known as the Rutherford yard, later owned by Dan Ross, and finally taken over by Big Blackfoot Milling Company (Mitchell, Tr. pp. 96-103-4). This yard ultimately resulting in the financial embarrassment of Dan Ross and the acquisition by Big Blackfoot Milling Company of a few shares of stock which Ross had owned in Missoula Mercantile Company has already been adverted to.

The evidence shows W. H. Hammond to have been a bona fide resident of the State of Montana during the period involved in the complaint.

---

We submit that the foregoing evidence was not sufficient to permit the case to go to the jury and that

the Court should have instructed the jury to find for defendant on the theory that there was not sufficient evidence offered to connect defendant with any of the conversions alleged to have been committed.

THE END OF PART ONE.

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*Attorneys for Plaintiff in Error.*

(APPENDIX FOLLOWS.)





## APPENDIX.

---

*In the District Court of the United States  
in and for the  
Northern District of California  
No. 15,130*

United States of America,

Plaintiff,

vs.

A. B. Hammond,

Defendant.

*Reported 226 Fed 84*

Frank Hall, Assistant Attorney General; Benjamin L. McKinley, United States Attorney, and Thomas H. Selvage, Assistant United States Attorney of San Francisco, California, for plaintiff.

Charles S. Wheeler and W. S. Burnett of San Francisco, California, for defendant.

Van Fleet, District Judge.

The government brought this action to recover the value of a large quantity of timber cut from the public lands and alleged to have been converted to the use of the defendant. The jury gave a verdict for the plaintiff and the defendant now asks for a new trial. There are several grounds assigned in the petition as involving error, but the only points upon which stress has been laid in the presentation of the motion are two, involving

the correctness of the charge of the Court upon the subject of the measure of damages. It appearing that all the timber in question had been manufactured and sold before suit the Court charged the jury as follows:

“If under the principles I have stated you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatsoever condition it may have been at the time of its disposition or sale. If you find that the defendant or any of said corporations while cutting under his direction and control converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale. In other words, if you find that timber was so cut and removed from lands of plaintiff and that there was added thereto certain value by reason of the manufacture of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacture of said lumber and price for which it was sold in the market.”

This feature of the charge gives rise to the first objection urged. It is contended that it is erroneous in that first, the measure of damages when the taking is innocent is not the difference between the expense incurred in manufacturing the lumber and the price for which it is sold, but is the stumpage value only. Second, that the instruction was inapplicable to the facts

of the case because there was no evidence to show the expense of manufacture of the lumber. In the first place I do not regard the exception reserved as sufficiently specific to point the Court's attention to either aspect of the objection now urged, and, if that view be correct, it cannot now be availed of to challenge the propriety of the instruction in the particulars complained of, even if otherwise well taken. The language of the exception is this:

"Next, as to the measure of damages we except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your Honor's instructions add to it another element."

It will be observed that the charge covers two alternative propositions. The first applicable to a wilful taking, the second should it be found that it was unintentional or innocent. As to the first, no question is now made as to its propriety, the objection being aimed at the second, ~~covering~~ <sup>governing</sup> an innocent trespass, but there is nothing in the language of the exception that would indicate to the Court whether it referred to the first rule stated or the second, and the Court, therefore, ~~could not~~ <sup>could not</sup> know to which the objection was intended to apply.

In its terms it would apply to one as readily as the other, but, moreover, if it may be said that the exception sufficiently indicates its application to the rule governing an innocent taking, it is wholly lacking in any suggestion that it was aimed at either of the defects now urged. It contains no intimation as to what



improper element was claimed to be included; nor does it even remotely suggest <sup>the idea</sup> that the charge was for any reason deemed inapplicable to the facts.

No question of procedure is better settled in these courts than that an exception to a charge in order to entitle one to have it entertained must be sufficiently distinct and specific to direct the attention of the Court to the particular vice or error complained of, that the Court may see whether the objection is well founded and have an opportunity before the jury retires to correct the mistake if one has been made. Thus in *McDermott vs. Severe*, 202 U. S. 600, 610, discussing an exception to the charge of the Court on the question of damages where as here the charge involved several distinct elements, it is said:

“The Court’s attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the Court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specially the part of the instruction regarded as erroneous. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 86; 39 L. Ed. 624, 629; 15 Sup. Ct. Rep. 491. \* \* \* It would be very unfair to the Trial Court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal.”

And again in *Mobile, etc., Co. v. Jurey*, 111 U. S. 584, 596, where the charge embraced two several elements, and the exception failed to specify as to which it was intended to apply, it is said:

“Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: First, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8 per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the Court the precise part of the charge that was objected to. ‘The rule is, that the matter of exception should be so brought to the attention of the Court before the retirement of the jury to make up their verdict, as to enable the judge to correct any error, if there be any, in his instructions to them.’ *Jacobson v. State*, 55 Ala. 151.

‘When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the Court to the precise point of objection.’ *R. R. Co. v. Jones*, 56 Ala. 507.

So in *Lincoln v. Claffin*, 7 Wall. 132, this Court said: ‘It is possible the Court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. \* \* \* But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. \* \* \* It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct.’ On these authorities we are of the opinion

that the ground of error under consideration was not well saved by the bill of exceptions."

The same principles are stated by Judge Morrow speaking for the Court of Appeals in this circuit in *Montana Mining Co. v. St. Louis M. & M. Co.*, 147 Fed. 897-909, and by Judge Gilbert in *Butte, etc., Mining Co. v. Montana, etc., Mining Co.*, 121 Fed. 524-528; see also *Springer etc. Co. v. Falk*, 59 Fed. 707; *Stewart v. Morris*, 96 Fed. 703; *Porter v. Buckley*, 147 Fed. 140; *Coney Island Co. v. Denman*, 149 Fed. 687; *Central, etc., R. Co. v. Mansfield*, 169 Fed. 614; *Beisecker v. Moore*, 174 Fed. 368.

Within the principle of these cases it would seem to be clear that the exception here taken to the feature of the charge under consideration is not such as to entitle the defendant to urge the objections sought to be interposed, but if we may regard the exception as sufficient in substance to enable the Court to consider the objections urged upon their merits, I think it will be found that the charge in the respect involved is fully in harmony with approved principles applicable to cases of this character.

In *Pine River Logging Co. v. U. S.*, 186 U. S. 279, 293, where the question as to the proper measure of damages in such cases is exhaustively considered, the Court, referring to the previous case of *Woodenware v. U. S.*, 106 U. S. 432, as "decisive of the law in this connection", say as to what was there decided:

"The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it was cut, or at the

town where it was delivered. It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. 'This right' (of the recovery of the property), said the Court, 'at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.' "

The principles there stated will be found reflected in their substantive effect in the language of the charge given, which though different in phraseology to conform with the facts of the case, states essentially the same rule. Counsel states that the charge is erroneous because in effect it directs the jury to deduct from the selling price of the lumber the cost of manufacture and bring in a verdict for the difference, thus giving the plaintiff the benefit of any profit upon the business



of manufacturing and selling the lumber, whereas it was only entitled, if the taking was other than wilful, to the value before manufacture. If the language will bear this construction, which is not conceded, there is a principle running through all the cases, sometimes implied rather than expressed, which the contention ignores, and that is, that one committing a trespass by converting another's property, although innocently, is not entitled to reap a profit on the transaction. If the purchaser in such a case is permitted to retain all that he has expended in enhancing the value of the converted property he is getting all the protection to which he is entitled. Thus in *Winchester v. Craig*, 33 Mich. 205, a leading case upon the subject, it is said:

“The Court under one branch of the charge instructed the jury to allow the market value at Detroit or Toledo less the sum of money which the defendant expended in bringing it to market. This we think was as favorable as the defendant had any right in this case to expect. This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit on what they had done, but protected them to the extent of the advances they had made, and this we think was correct.”

See also *Trustees of Dartmouth College v. The<sup>Inter</sup>National Paper Company*, 132 U. S. (This should be *Fed.*) 92.

As to the point that the instruction was inapplicable to the facts of the case I deem it sufficiently answered by the record; the second objection urged against the

charge is based upon this language on the subject of interest:

"In ~~taxing~~<sup>fixing</sup> the amount ~~is~~<sup>of</sup> any verdict you may find for plaintiff, you should include interest on the value of any lumber so converted from the ~~date~~<sup>date</sup> of such conversion to the present time. \* \* \* The rate of interest is the legal rate of 7%."

The ~~objection~~<sup>exception</sup> reserved to this portion of the charge was in these words:

"I also except to your Honor's instruction with regard to interest."

It is obvious I think that this exception is insufficient within the principles of the cases above stated and particularly Mobile, etc., v. Jurey, supra, the latter case being ~~peculiarly~~<sup>precisely</sup> opposite in the nature of the question involved. As in ~~this~~<sup>that</sup> case the charge here embraces two distinct propositions on the subject to which it relates. First, the right of the plaintiff to interest and second, the rate by which it is to be estimated. The criticism now made is, not that plaintiff was entitled to interest in no event, but that its allowance should, under the circumstances, have been left to the discretionary judgment of the jury. But manifestly the language of the exception is not of a nature to convey any such significance to the mind of the Court, nor indicate whether the objection was aimed at the direction to award interest or to the specification of the rate at which the jury should compute it. Had the Court's attention been arrested to the objection now urged it would have been a very easy matter to modify its language to avoid the criticism had it been deemed

correctly founded; but although the prayer of the bill was amended at the trial to include the demand for interest and plaintiff's requested instructions included one for its allowance, those of defendant were silent on the subject and the charge was framed upon the assumption by the Court that its allowance was a matter of right. Moreover, the specification of the rate of interest having been inadvertently omitted from the charge, was added by the Court at the suggestion of counsel for the government before the jury retired, and neither then nor thereafter in taking his exceptions did defendant suggest any objection to the direction on the subject other than the general exception above noted. Under the circumstances I think the assertion of the objection now made must be held as unavailing.

In view of this conclusion, it would subserve no useful purpose to discuss <sup>definitely</sup> the question strongly mooted between counsel, whether the objection now urged if properly raised would be well taken. It may be suggested that while the question seems left in some doubt and difference in the Federal courts whether interest in the absence of statutory sanction is allowable as a matter of right, the rule of the charge is the generally prevailing one (Sedgwick's Elements of Damages, p. 137, 2nd Ed.; 1 Sedgwick on Damages, 631; Joyce on Damages, Vol. 2, p. 1261, par. 1105; Sutherland on Damages, Vol. 2, p. 969, par. 355) and is that prescribed by statute in this and most of the other states. These suggestions are made merely to illustrate that the question in controversy is a close one and the case, therefore, essentially one where the exception should have

been such as to specifically direct the attention of the Court ~~as~~ to the precise objection intended to be raised.

As indicated, the other errors assigned have not been strongly urged and do not call for extended notice. As to the suspending, at the request of the jury, of the further reading of the evidence of the witness Hathaway, it clearly in my judgment involved no prejudicial error. The evidence was being read solely to refresh the memory of the jury, and when it reached a point where they announced that their desire was satisfied and they wished to hear no more, the object for which they had come into the Court was accomplished and the Court was justified in ordering the reading stopped. Presumptively the jury expressed this desire because they remembered the evidence of the witness in other respects. The case is unlike that of *Hersey v. Tully*, 8 Colo. App. 110, relied on by defendant. There the Court against the objection of defendant directed what evidence should be read to the jury. Here the evidence was read with the consent of both parties until the point where the jury announced themselves satisfied. Logically could the reading not have been stopped then it could not with <sup>any</sup> ~~more~~ propriety have stopped short of reading all the evidence taken. As suggested by the Court at the time, it was a question of the extent to which the jury felt ~~that~~ they were in need of having their minds refreshed, as they had heard the entire evidence from the witness stand.

As to the point made that the evidence was insufficient to justify the verdict, I am satisfied that a reading of the record will disclose that this is without



substantial merit. These are all the points made, and I find nothing in them to warrant the Court in granting a new trial.

The motion is accordingly denied.

No. 2503

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

PART TWO

Comprising

QUESTIONS OF LAW FOR DETERMINATION.

CHARLES S. WHEELER,

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*Attorneys for Plaintiff in Error.*

*Filed this*.....*day of January, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By*.....*Deputy Clerk.*

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*Clerk.*



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### PART TWO

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### QUESTIONS OF LAW FOR DETERMINATION.

NOTE: Citations to pages supra 1 to 117 will be understood as referring to Part One of our brief. Table of Cases cited herein will be found on pages next preceding this.





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**2. UNDER THE LAW DEFENDANT DID NOT SUSTAIN ANY SUCH  
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Plaintiff's theory as to the basis of defendant's responsibility was covered by the Court in an instruction to the jury which is set forth at pages 51 et seq., supra.

Upon the hearing in this Court no precedent or principle was cited or relied upon to sustain a recovery herein and we confess to lacking the imaginative power necessary to outline some legal theory upon which defendant's liability can be sustained. We, therefore, cannot propound a theory and then demonstrate wherein its application to the case of defendant would be fallacious. A painstaking search of the American and English decisions has not disclosed a single case where any Court has even been asked to fasten responsibility upon an individual for the acts of others upon evidence of the character adduced herein. Much less, of course, can any precedent be found to sustain a finding of liability upon such evidence.

Analyzed, the basis of defendant's liability in the premises must be found rooted in the fundamental principles of agency, in the consideration of which we could not hope to enlighten this Court. We can only beg of this Court a patient review of the evidence which we earnestly believe is comprehensively gathered together in pages 51-117 supra.

Failing utterly, as does the evidence, to establish any specific or actual relation of agency between defendant

and the persons or corporations who it is alleged committed this conversion, it but remains to consider what legal responsibility inheres merely from the fact that defendant may have been an officer of or stockholder in a corporate wrongdoer. In this connection the evidence shows that defendant was nominally the manager and director of Montana Improvement Company for a while; possibly a director in Blackfoot Milling & Manufacturing Company; a director of Big Blackfoot Milling Company and for a while president, and at all the times mentioned in the complaint after the organization of Missoula Mercantile Company in August, 1885, a director of the company last mentioned.

That the relationship of one to a corporate wrongdoer as president, director or stockholder does not in and of itself make such an one liable for torts committed by the corporation is thoroughly well established.

In *Folwell v. Miller*, 145 F. 495; 75 C. C. A. 489, an endeavor was made to hold the president of a corporation, publishing a newspaper, who was also its editor-in-chief and principal stockholder, personally and civilly liable for a libel published in the newspaper. The Circuit Court of Appeals for the Second Circuit in denying any liability, through Wallace, C. J., said:

“That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition that does not require extended discussion. The president of a corporation is an agent of very extensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are



the directors or stockholders for torts committed by the corporation in the absence of personal participation in the tortious act. As an agent he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employees (Citing cases) \* \* \*”.

The Court then considers the liability of defendant because of his relation to the newspaper as editor-in-chief and in concluding that there was no liability on this head, said:

“The owner of a newspaper is liable for whatever may be published in it, because all those who are engaged in preparing and publishing it are his servants, and the publishing is an act within the scope of their employment. It is therefore deemed the act of the owner himself, and, although done without his knowledge, or contrary to his express instructions, he must bear the consequences. The same principle applies to every tort committed by a servant in the course of his employment, whether it is a mere neglect, or a tort of a wilful and malicious quality. The editor-in-chief, however, exercises a delegated authority for the owner, and consequently, is but an agent of the owner, even though he be editor-in-chief. His subordinates are not his agents or servants because the power to select them and discharge them belongs to the owner, and they are not under his control when that power resides in a higher agent, notwithstanding he is permitted to control them when the owner does not see fit to intervene. It is impossible to differentiate the relation of an editor and proprietor from that of an agent and principal. We conclude that the trial judge correctly ruled that the defendant was not liable for the act of his subordinate under the circumstances of this case.”

## TOPIC II.

**THE COURT SHOULD HAVE INSTRUCTED THE JURY TO FIND A VERDICT FOR DEFENDANT INASMUCH AS IT APPEARED THAT ANY TIMBER, WHICH MAY HAVE BEEN TAKEN, WAS CUT PRIOR TO THE TAKING EFFECT OF THE ACT OF MARCH 3, 1891, AND THAT SUCH TIMBER WAS CUT BY RESIDENTS OF THE STATE OF MONTANA AND USED IN THE STATE OF MONTANA FOR THE PERMITTED PURPOSES.**

The Act of March 3, 1891, Ch. 561, 26 Stat. L. 1095, entitled "An Act to Repeal Timber Culture Laws and for Other Purposes" is a most comprehensive statute embracing much of the public land legislation which was formulated by the session of Congress which came to an end on the date of the enactment of said Act, namely, March 3, 1891. In a note appended to Section 1 of said Act, to be found at 6 Fed. Stats. Ann. 497, 498, will be found a convenient and brief reference to the topics respectively treated in the twenty-four sections embraced in the Act. In passing we would here note that Section 7 of the Act—6 Fed. Stats. Ann. 525—provides among other things that where two years have expired after the issuance of a final receipt and no contests have been initiated, that the entryman should then become entitled to a patent. Addressing itself to this section of the law the Supreme Court of the State of Montana characterized it as "a remedial statute, a statute of repose."

Graham v. Great Falls Water Power Company,  
30 Mont. 393; 76 Pac. 808.

The first sentence of Section 8 of said Act—6 Fed. Stats. Ann. 526—contains the statute of limitations

which recently has been before our Circuit Court of Appeals and in which it was held that active concealed fraud prevented the running of the limitation therein provided, which limitation is that suits to annul patents shall only be brought within six years after the date of the issuance of such patents.

Linn & Lane Timber Co. v. U. S., 203 Fed. 394;  
121 C. C. A. 498;  
Affirmed, 236 U. S. 574.

We thus at the outset find we are construing a statute which throughout evidences the desire of Congress to condone and put at rest controversies and uncertainties which were but productive of evil alike to the interests of the United States Government as a proprietor and the settler, who had been having and was then having a difficult struggle in the development and upbuilding of the West. Immediately following this first sentence in said Section 8 is the provision with which we are here specially concerned:

“Sec. 8. \* \* \* And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same; but nothing herein contained shall apply to operate to enlarge the rights of any railway company to cut timber on the public domain; *provided*,

That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this section.” (26 Stat. L. 1099.)

On the same day as this Section 8 was enacted as a part of the so-called Act of March 3, 1891, another statute was enacted entitled “An Act to Amend Section 8 of an Act Approved March 3, 1891, entitled ‘An Act to Repeal Timber Culture Laws and for Other Purposes’”. The amending Act last mentioned is known as Chap. 559 and will be found at 26 Stat. L. p. 1093. As said Section 8 was amended by this Act, the language remained the same as to the time within which suits should be brought to annul or set aside patents and it then proceeds as follows:

“And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska, and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes *under rules and regulations made and prescribed by the Secretary of the Interior* and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, Provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, *and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third,*



*eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."* (26 Stat. L. 1093.)

The italics in the foregoing quotation are our own and serve to point out the additions which the amending Act made to Section 8 as contained in the original Act.

Section 8 in its two forms will be found in the text and notes, 7 Fed. Stats. Ann. p. 306.

A careful reading of the Congressional Record has failed to disclose which Act was first signed by the President and it would at least seem morally certain that the original Act had not been approved by the President at the time when the amending Act went through the House and Senate. We have been credibly informed that there is no record at the White House to indicate which Act was in fact first approved by the President.

We are not clear that these considerations are of particular moment. The amending Act presupposes an existing enactment. If in fact there was not such an existing enactment then it would seem as though the amending Act would have nothing to operate upon, hence would be void, and the original Act when it was signed by the President would necessarily become law. On this theory, then, we are not concerned with the amending Act. If, on the other hand, we must assume that the original Act became a law and it is only on the theory that it was an existing law that any force can be given to the amending Act, then we have a situation where, if it be only for a moment of time, Section 8 as it was originally enacted, became and was

the law of the land and if Section 8 as originally enacted contains a condonation of a more liberal character than found in the amending Act, we contend that it was not possible, as against constitutional guaranties, to restore liability for the Acts condoned.

Section 8 as originally adopted was retrospective as well as prospective in its operation and it furnished a clean bill of health as to timber cut in the past, and, for that matter, as to the future in the event that the Secretary of the Interior made no rules in pursuance of the section, or if he made rules in the future and these rules were observed.

Section 8, as amended, we think, made it clear that as to the future it would be a prerequisite to the right to cut timber on the public domain that the Secretary of the Interior should have made rules and that these rules should have been complied with and, as a matter of fact, a comprehensive set of rules and regulations were very soon promulgated by the Secretary of the Interior and it was under such that the "Timber Permit" (a copy of which is set forth in Tr. at pp. 462 et seq.) was issued to Big Blackfoot Milling Company. The application or petition for this timber permit is set forth (Tr. p. 450), also some correspondence (Tr. pp. 467-8) by which the permit was made effective for Big Blackfoot Milling Company instead of Blackfoot Milling & Manufacturing Company, which had made the application.

Our contention is that the retrospective operation of the statute as originally adopted was never repealed

or amended—and indeed could not be as a matter of constitutional law were it otherwise intended—by the amending Act. Maybe the true rule is that the two Acts should be construed together and thus an attempt to do an unconstitutional Act need not be attributed to Congress, in which event we would have Section 8 as it was originally enacted remaining effective so far as it operated retrospectively and as to the future that said section as amended furnishes the sole authority.

We have already observed that the conferring of this “defense” is found in the same section as is the statute of limitations providing within what time suit should be brought to annul patents and it is certainly about as clumsy a way as could be imagined of making provision for the issuance in the future of permits to cut timber on the public lands by the Secretary of the Interior, if that was all that was intended by Congress. We believe that by this legislation Congress intended and endeavored to wipe the slate clean as to all cases where timber had been cut by bona fide residents and had been used in the territory or state where cut for the purposes named in the Act and this we apprehend to be the ruling of the Supreme Court of the United States in the case of

Northern Pacific Railroad Co. v. Lewis, 162  
U. S. 366, 377; 40 L. Ed. 1002.

That was an action by persons who cut timber on the public lands against Northern Pacific Railroad Company to recover damages for the loss of that timber caused by fire alleged to have occurred through the

negligent operation of the defendant's railroad. The Supreme Court of the United States held that plaintiffs had failed to show any title in the property or such right of possession thereto as would enable them to maintain the action. The statement of facts in the case shows that the cutting of this timber was done in *1889 and 1890*. Plaintiffs attempted to show title in themselves by virtue of the Mineral Land Act of June 3, 1878, contending that where no evidence was given upon the subject the presumption should be that they had complied with the provisions of that Act and that the cutting was, therefore, legal and the timber was their own property. As to this defense Mr. Justice Peckham, delivering the opinion of the Court, found there was no evidence tending to show that the lands where the wood was cut were mineral or that in cutting, handling or removing the wood the plaintiffs had complied, or attempted to comply with the provisions of the Act, or with the rules or regulations prescribed by the Secretary of the Interior. In disposing of plaintiff's contention the Court held that the right to cut was exceptional and quite narrow and that it was for plaintiffs to show that they had complied with the statute.

Addressing itself to the two Acts of March 3, 1891, the Court, pp. 377-8, says:

“Nor did the plaintiffs obtain any rights under Section 8 of the laws of Congress approved March 3, 1891, entitled ‘An Act to Repeal Timber Culture Law and for Other Purposes.’ 26 Stat. at L. 1099. That section was amended by the act approved on the same day, March 3, 1891, 26 Stat. at L. 1093. Neither section grants any relief to one situated like the plaintiffs. The section in



either act looks to a criminal prosecution or civil action by the United States for trespass upon public timber lands to recover for the timber and lumber cut thereon, and it is provided that it should be a defense if the defendant should show that the timber was so cut or removed by a resident of the state or territory for agricultural, mining, manufacturing, or domestic purposes, and had not been transported out of the same. If the plaintiffs had shown these facts they would have proven enough to sustain their case on this point. They showed nothing upon the subject."

There seems to be no escape from the ruling of the Supreme Court that had these plaintiffs shown themselves to be bona fide residents of the State of Montana and that the timber they had cut was in good faith intended to be used for the purposes permitted by the Act that then they would have been furnished with a good defense had the Government been the party plaintiff seeking recovery for the timber.

Be this as it may and, perhaps, it may be charged that in saying it, it was but *obiter*, nevertheless the Supreme Court of the United States plainly indicates that the Acts of March 3, 1891, had a retrospective operation and of necessity if these Acts are to be given a retrospective operation, obviously, as to such retrospective operation, the requirement that the cutting be done under rules and regulations to be prescribed by the Secretary of the Interior, cannot apply, because there never were any such rules and regulations prior to the passage of the Acts, and we respectfully submit that this ruling should be sufficient for the proper disposition of the case at bar.

The disposition and use of the product cut at Bonner and Bonita is summarized at pages 113 et seq., supra, and shows that all the timber alleged to have been converted was cut by bona fide residents or citizens of the territory of Montana and used for the purposes prescribed by the Act within the territory of Montana.

It furthermore appears that substantially all the timber, with the conversion of which defendant is charged, was severed not later than 1891.

As to the Hellgate timber Fenwick testified that he cut along the Hellgate from May, 1886, to May or June, 1891, and that during the years 1890 and 1891 his operations were very small, supra p. 71. Here we must recall that Fenwick was cutting indiscriminately on land which afterwards upon survey became odd numbered sections. There is no evidence (*we say this advisedly*) that any of the timber alleged to have been taken from the Hellgate lands *described in the complaint* was cut subsequent to 1890.

As to the Blackfoot country for the purposes of the present topic much of it could be most simply disposed of by giving due weight to the consideration that the Government, as to several claims, had lost the right to the timber growing thereon prior to March 3, 1891, owing to the earlier date of the initiation of the settlers' right subsequently ripening into a patent—which dates respectively are established by stipulation (Tr. 743). If the testimony shows a cutting at a later date than that of such initiation, then, obviously, there was no conversion. If the cutting was earlier, then the protection afforded by the Acts of March 3, 1891, applies. Needless

to say, the plaintiff's testimony, such as it is, was directed to the establishment of conversions prior to the date of such initiation.

We shall, therefore, briefly review, claim by claim, the cutting on the Blackfoot, mainly with the end in view of showing such cutting either to have been prior to March 3, 1891, or, if subsequent thereto, that in fact no conversion was proved against any one. In several instances we shall find both conditions concurring. In some, details will be given which are of importance only in the consideration of other errors, but it is thought best to marshal all the facts concerning each claim once and for all.

Taking the claims in the order in which they appear in the stipulation (Tr. 743) they are as follows:

#### **Cunningham Claim:**

This—the N. W.  $\frac{1}{4}$  Sec. 34-14-14, was a pre-emption cash entry made by Elijah F. Cunningham April 1, 1890 (Tr. 743-4). As the Government has no right to recover for any timber cut thereon subsequent to April 1, 1890, it is obvious that any conversion for which there might be a recovery must be within the retrospective operation of the Acts of March 3, 1891. Dan Graham testified (Tr. 71) that in 1909 he scaled this claim and found 2486 stumps, which he estimated furnished 1,600,-280 feet of timber.

The sole testimony of the Government to establish this conversion was the bald statement of the witness, Milton Hammond (Tr. 143) that he scaled the timber on this quarter section in the year 1887 (he thinks); that Jack

Cunningham, the logger (not Elijah F. Cunningham, the entryman), cut off the logs. Jack Cunningham testified (Tr. 268) that he cut southeast on the side hill across from the Edgar claim in 1887-8; that he is not familiar with the lines and has no idea how much was cut off; that he just took the timber that came handy; doesn't think they went near the line at all (Tr. 276-7).

It is to be observed that Jack Cunningham denied that the section had been entirely cut over and yet the Government's estimate of what was taken is based on the theory that the defendant was responsible for the timber taken from all the stumps found on the ground in 1909. Clearly as to this quarter section the Government's proof failed in the essential as to the amount of the conversion. As a matter of fact, Jack Cunningham was mistaken, and Milton Hammond something worse.

The fact is that the Cunningham claim was cut in part in the winter of 1891 by E. R. Kilburn and the balance of it in 1892 by William Boyd.

Henry Martin (Tr. 505-6);

E. R. Kilburn (Tr. 510);

William Boyd (Tr. 527);

John C. Hammond (Tr. 531-2);

Frank Foster (Tr. 413);

Chancy Woodworth (Tr. 494).

### **Tuchenhagen Claim:**

This claim comprised Lots 7, 8, 11 and 12 in Sec. 18-14-15, and was a pre-emption cash entry made by William Tuchenhagen July 12, 1890 (Tr. 744). Thus, as in the case of the Cunningham claim, the Acts of March



3, 1891, afford a defense if any conversion was proved. However, no conversion was proved.

Dan Graham testified (Tr. 70-71) that in 1909 he found 2026 stumps, from which he estimated 1,124,870 feet had been taken.

Government witness, John Graham, testified (Tr. 160) that in 1886 timber was cut on Sections 17 and 18 in Township 14 N. R. 15 W.; that he was there all winter under John Cunningham driving horses and felling logs. John Cunningham testified (Tr. 267) as to being in charge of this camp, as testified to by John Graham; he knew where said Section 18 was located and that they had cut all around the lines of it, but he didn't think they cut over the lines.

It is to be observed that Government witness, Cunningham, contradicts Government witness, John Graham, on the proposition that any timber was cut at that time off said Section 18 and witness, John Graham, does not attempt to designate from what portion of said section the timber was taken. We submit the Government failed to prove a conversion against any one so far as this claim is concerned.

An effort was made to show by Dan Graham, as an expert, that the stumps on the Tuchenhausen claim indicated that they had been cut earlier by some five or six years than the cutting on Lots 9 and 10 in this section, constituting land related to the timber permit, which latter was cut in 1892-3 (Tr. 72-3). Objections and exceptions were taken to this line of testimony and will be considered hereafter.

Opposed to the Government testimony was that of Tuchenhausen, the settler, who testified (Tr. 519) that when he settled thereon in 1890 no timber had been cut on his claim, or on any part of the section for that matter; Tuchenhausen sold the claim to W. H. Hammond. He testified (Tr. 449) that he examined it at the time of the purchase and found no timber had been cut thereon except for house and fences and that the claim was cut in the winter of 1892-3.

#### **Longley Claim:**

This comprises the south half of the N. W. quarter; east half of the S. W. quarter of Sec. 28-14-16. Only the 80 acres in the N. W. quarter are involved in this action. This was a preemption cash entry made April 26, 1890 (Tr. 744), so here, again, the Acts of March 3, 1891, apply. Also, as a matter of fact, no conversion was proved as will appear under the title of the Merrick Claim, which is next considered.

#### **Merrick Claim:**

This claim appears (Tr. 744—middle of page) to have been initiated subsequent to March 3, 1891. It is only as to so much of said claim, namely 40 acres, that is embraced in the N. W.  $\frac{1}{4}$  of Sec. 28-14-16, that is involved in this action. This N. W.  $\frac{1}{4}$  of said Sec. 28 is, as to the south 80 acres thereof, embraced in the Longley claim, which was initiated prior to March 3, 1891, and the north 80 acres thereof comprises, as to the N. E.  $\frac{1}{4}$  thereof part of the said Merrick Claim and as to the N. W.  $\frac{1}{4}$  thereof part of the Rowe claim, which was initiated subsequent to March 3, 1891.

There can be no question but that there was not a scintilla of evidence to establish a conversion by any one on the N. W.  $\frac{1}{4}$  of said Sec. 28, and that had defendant asked for an instructed verdict as to this particular  $\frac{1}{4}$  section it must have been granted or the failure of the trial Court to do so would have constituted as to said  $\frac{1}{4}$  section reversible error readily demonstrable. For present purposes, however, we do not feel that we need weary the Court with a recital of the testimony. It is enough to say that the Government witness, *John Graham* (Tr. 161) endeavored to establish a cutting with which he had been connected as driver of a team in the general vicinity of the so-called Longley Flats (which extended down the Blackfoot River from the N. W.  $\frac{1}{4}$  of said section and took in nearly all of Sec. 29 in the same township (Tr. 501) in the year 1887 or 1888. The Government witness, *McNamara*, testified (Tr. 279-80) that he knew where the camp was located in reference to the cutting referred to by *Graham* and that the cutting was done on said Sec. 29 and possibly also on Sec. 21 in the same township; that he knew of no cutting on the Longley Flats.

Furthermore the only testimony as to the amount of timber taken *in this vicinity* was that of *Dan Graham* (Tr. 71) who testified that he scaled upon said Sec. 28-14-16 north of the Blackfoot River; that he found 972 stumps, estimated at 566,080 feet and that he did not know how many acres were there that he scaled. This scaling was done for plaintiff in 1909 (Tr. 69).

It will be observed there is no distribution over the four 40's of the amount scaled by *Graham* and it will

not be controverted by our opponent but that the territory scaled "north of the river" extended south of the east and west center line of said Sec. 28 into territory which is not involved in the action. Indeed it was admitted that the jury might disregard all testimony as to south of said center line, but as there was no distribution of Graham's estimate and nothing to show how much of his estimate applied outside of the N. W.  $\frac{1}{4}$  of said section, this simply meant that on the question alone as to the amount of timber alleged to have been taken from the N. W.  $\frac{1}{4}$  of said Sec. 28 there was no evidence to take the case to the jury.

In connection with said N. W.  $\frac{1}{4}$  of said Sec. 28 Longley, the settler, testified that no timber had been cut on his claim when he settled on the land April 26, 1890, or when Merrick, who was his brother-in-law, settled on his, Merrick's claim, March 28, 1891, except that some little had been cut from the latter for buildings; that he cut some of the timber in 1891 on his (Longley's) claim, assisted by William Tuchenhausen (Tr. 517), which the latter corroborates (Tr. 520). Witness Pat Hayes (Tr. 500-1) testified to the same effect and so did John C. Hammond (Tr. 531, 535); so did the witness, Kilburn (Tr. 510). The witness, W. H. Hammond, testifies (Tr. 442-3) that he did no logging upon any portion of the N. W.  $\frac{1}{4}$  of said Sec. 28, either while he was operating the Bonner mill for himself or under the lease or while as president and manager of Big Blackfoot Milling Company. He testifies to buying the logs which Longley had cut



on his claim, but these were the only logs that ever at any time went to the mill at Bonner from said Sec. 28.

The timber on the Rowe claim was never cut except at a small point where it almost touches on the Black-foot River.

It will thus be seen that not only was no conversion proved as to said N. W.  $\frac{1}{4}$  of said Sec. 28, but that if the vague testimony of the witness, *John Graham*, has any significance whatever it determines 1887 or 1888 as the time when the cutting was done. If, on the other hand, the defendant's witnesses are to be believed then the limited cutting done by Longley on his own claim was done in 1891 and long after the Government had lost any right to the timber growing thereon.

We therefore contend that for any and all purposes the N. W.  $\frac{1}{4}$  of Sec. 28-14-16 must be ignored.

### **Kelly Claim:**

This claim was briefly referred to supra, page 86. Title was initiated by John Kelly on August 24, 1894 (Tr. 744), when he entered it as a Timber and Stone entry. The Government produced one witness, James M. Boles (Tr. 281-4) who "thought" this claim was cut off in the year 1891 (Tr. 281); he was "pretty sure" the timber was cut off in 1891 (Tr. 283). Finally, he "wanted to be understood as testifying" that all the timber was cut off the Kelly claim in 1891 (Tr. 285). The Government estimate was that 1,707,420 feet had been cut from this claim.

Opposed to this was the testimony of the witness, Malloch, who scaled the claim while it was being cut *in 1896* (Tr. 521); that of W. H. Hammond, who bought it from Kelly *in 1896* and who at the time of buying it went over it and estimated it and found that no timber had then been cut thereon (Tr. 448-9); finally Woodworth, who had charge of the Northern Pacific Railroad timber, was familiar with this claim by reason of his caring for and running lines on adjoining railroad sections and he testified it was not cut in 1891 (Tr. 495).

It may well be questioned whether there was sufficient evidence to sustain a recovery on the theory of a conversion in 1891. If we accept the showing made by defendant that the claim was cut in 1896, of course, there was no conversion at all as the Government had then lost title to the timber. If, however, we are compelled to assume that the jury found the claim to have been cut in 1891, then we would point out that it does not appear that the claim was cut in 1891 subsequent to March 3 and that, therefore, the Act of March 3, 1891, applies.

### **Boyd Trespass:**

The E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  Sec. 22-14-14 ceased to be Government property when it was taken up as a Timber and Stone entry in 1908 (Tr. 744). The so-called Boyd Trespass extended part way into this 80 acre tract. The original theory of the Government was that the timber on this 80 acre tract was cut at the same time as the timber was cut off the Sontag

and two Silvey claims in this section, which alleged trespasses the Government abandoned on the trial (*supra* p. 7, par. 1). The time when this alleged trespass occurred was in 1887 and 1888, but defendant was able to prove and did prove by depositions taken in Montana that the Sontag and Silvey claims had not been cut until a much later date, long after the Government had parted with title thereto—and therefore, the Government abandoned its case in respect to these claims. Whether or not it abandoned its theory as to the Boyd Trespass which attributed it to that much earlier date and accepted the explanation of this trespass as offered by Boyd himself who was called as a witness on defendant's behalf, we do not know. This explanation was to the effect that Boyd was cutting the Silvey claims in 1892 and 3 and in doing so he unintentionally cut over the lines and encroached upon this 80 acres (Tr. 526-7); that he never discovered this until August, 1912, after this suit was commenced, when he went over this ground in company with W. H. Hammond and others (Tr. 529). At Tr. 722 it was admitted by defendant that this man Boyd had a contract with the Big Blackfoot Milling Company for the cutting of logs on the Silvey claim adjoining the 80 acres under consideration, but that his contract did not extend to this 80 acres, or any part thereof. In this connection W. H. Hammond testified (Tr. 447-8) that this trespass by Boyd was done in 1892-1893 during the time when he, W. H. Hammond, was manager of Big Blackfoot Milling Company; he did not know how Boyd came to cut it; he gave him no directions to cut

it; that the cutting on this 80 acre tract never had his consent or approval and that the first he knew of it was when he was up over the land after this suit had been brought.

After this suit was brought *Dan* Graham, on behalf of the Government, scaled this 80 acre tract and found 528 stumps, which he estimated represented 356,690 feet (Tr. 71).

As to this 356,690 feet, for which it may be conceded Big Blackfoot Milling Company is responsible as for an innocent conversion, which certainly was likewise the character of Boyd's trespass, it is clear no protection is afforded any one by the Act of March 3, 1891.

#### **Kilburn and Cobban Claims:**

These claims are embraced within the S.  $\frac{1}{2}$  of Sec. 20-14-15 and were initiated respectively October 29, 1892, and August 31, 1891 (Tr. 744). In 1909 William Greene was employed by the Government (Tr. 77) to make estimates of the amount of timber that had been cut on certain lands and found that on the S.  $\frac{1}{2}$  of said Sec. 20 there were 1801 stumps indicating a taking of 469,750 feet (Tr. 78).

In this case there was a total lack of evidence to warrant the finding of a conversion against anyone. The sole testimony of the Government was that of the witness, Milton Hammond, which was to the effect (Tr. 143) that he "thought" he scaled on timber taken off said Sec. 20. His recollection was that it was Gilbert who cut off this section; that he does not remember the exact time, but that it must have been somewhere in



the 90's. Government witness, Cunningham, testified (Tr. 268) that he did not cut anything off said Sec. 20.

Opposed to this hazy conjecture (and be it noted the testimony of the witness, Milton Hammond, does not attribute this cutting to the S.  $\frac{1}{2}$  of said Sec. 20, which is the only portion of the section with which we are concerned) is the testimony of Kilburn (Tr. 511), who was the entryman on one of the two claims embraced in the S.  $\frac{1}{2}$  of said Sec. 20, to the effect that when he took up the claim none of the timber had been cut therefrom. He sold the claim to McKinnon & McLaren and at that time no timber had been cut from the claim. William Boyd purchased it (Tr. 527) from McKinnon & McLaren in 1898 and cut some 250,000 to 300,000 feet therefrom, which he later sold to W. H. Hammond, who was managing the Big Blackfoot Milling Company for a while after its sale to Daly and he later sold the claim to one Vogel for \$1000 (Tr. 528).

W. H. Hammond testified (Tr. 443-4) that he did not, either individually or in connection with any of the corporations referred to, nor did said corporations, cut over any part of said Sec. 20; that William Boyd cut a part of the Kilburn claim near the Blackfoot River at about the time of the sale to Big Blackfoot Milling Company in 1897-1898 and that he, W. H. Hammond, never did any logging on the Cobban claim at any time (Tr. 444).

We submit that as to the S.  $\frac{1}{2}$  of said Sec. 20 embracing these two claims the Government failed to make a case. In the first place, Milton Hammond's vague con-

jecture that somewhere in the 90's cutting was done on Sec. 20 is not sufficient to establish a trespass *on the S. ½ of Sec. 20*. Further, if we are wrong in this, a perfect affirmative defense was made by defendant as to the Kilburn claim, and as the plaintiff's estimate of the amount cut off the S. ½ of Sec. 20 is not distributed as between the two claims, a perfect defense as to one, necessarily leaves no evidence from which the amount of timber taken from the other can be computed.

#### **Boileau Claim:**

The complaint charged the cutting of timber on 80 acres embracing the N. ½ of the N. E. ¼, Sec. 26-14-16, which was part of the Timber and Stone entry made by John P. Boileau October 22, 1894 (Tr. 744). In 1909 William Greene, employed by the Government for the purpose, estimated that on this 80 acres there had been cut 199,960 feet from 414 stumps. The Government's evidence apparently was directed to establish this conversion around 1888; but there was a total lack of evidence of any conversion. Government witness, Cunningham, testified (Tr. 269) that he "contracted" that year to cut timber from Secs. 23 and 25, which he did (Tr. 272) and built his camps on Sec. 26 and bridges with timber cut from said Sec. 26. He was working in partnership with McNamara and W. H. Hammond "called him down" for cutting this camp and bridge timber off Sec. 26. It was no part of his contract with W. H. Hammond for W. H. Hammond to furnish the camp and bridges, and these logs for that purpose were cut for Cunningham's own benefit and upon his own

responsibility (Tr. 271). All of this is confirmed by Government witness, McNamara (Tr. 279-80). Pat Hayes testified (Tr. 501-2) that no logging had been done on this claim until 1895 when it was cut by Dunnigan, though a few trees had been cut for ties or something of that kind. W. H. Hammond's testimony (Tr. 443) is to the same effect. Some of this trifling early cutting on this claim is also accounted for by the operations of a man named Sloan, who cut ties and piling bandy to the Blackfoot River in 1882 (Tr. 483), with which, of course, defendant has no connection whatsoever.

**Rowe Claim (Tr. 745):**

This has already been considered under the title of "Merrick Claim".

**The Timber Permit:**

The complaint charged the cutting of timber from the south half of Sec. 18-14-15. This section was a short section from east to west comprising only three lots. The south half is composed of Lots 7, 8, 9, 10, 11 and 12. Lots No. 8, 11 and 12 comprise the Tuchenhausen Claim, which we have already considered in this topic. For want of a better general term the Tuchenhausen claim may be described as being the S. E.  $\frac{1}{4}$  of said section. Lots 9 and 10 would comprise the southwest  $\frac{1}{4}$ , Lot 9 the north half and Lot 10 the south half of said southwest  $\frac{1}{4}$ . Big Blackfoot Milling Company applied (Tr. 453, fourth line from top) to the Secretary of the Interior for leave to cut off all of Section 18, except the

southwest quarter. In other words the company applied for leave to cut off the north half *and* the S. W.  $\frac{1}{4}$  of said section (as we have seen the S. E.  $\frac{1}{4}$  was already taken up by Tuchenhausen). The permit, as granted, read the N. half *of the* S. W.  $\frac{1}{4}$  of said section (Tr. 463, middle of page). As will be seen (Tr. 464) this small item is found in a description which embraces the permission to cut timber from 11,280 acres "as more specifically described in its (Big Blackfoot Milling Company) application".

We have no doubt the Government intended to grant the right to cut from the N. half *and the* S. W. quarter of said section (Lots 9 and 10 containing respectively 45 acres) and not merely Lot 9, the so-called north half of the S. W.  $\frac{1}{4}$ . The customary abbreviation (an instance of it will be found in the description in the complaint in the case at bar) is as follows: N.  $\frac{1}{2}$ , S. W.  $\frac{1}{4}$ , Sec. 18. This does not mean the N. half *of the* S. W.  $\frac{1}{4}$  of said section, but it does mean the N.  $\frac{1}{2}$  of Sec. 18 *and the* S. W.  $\frac{1}{4}$  of Sec. 18. In checking over a description it is easy to understand how such a mistake could be made, particularly where the mind of the person engaged in the work would be expecting and finding a correspondence throughout between the application and the permit.

Dan Graham in 1909 found 294 stumps on Lot 9, which is covered by the permit, from which he estimated 161,340 feet had been cut, and on Lot 10, mistakenly supposed to have been covered by the permit 408 stumps, representing 193,390 feet (Tr. 70-1).



Plaintiff's testimony leaves us in doubt as to whether or not it was intended to establish a cutting on these two lots at the same time as they claimed (ineffectively) the Tuchenhausen claim had been cut (see Tuchenhausen claim in this Topic, *supra*). If so, as will appear from our discussion as to the Tuchenhausen claim plaintiff failed to establish a conversion.

On behalf of defendant, W. H. Hammond testified that the cutting on these Lots 9 and 10 in Sec. 18-14-15 was done by Big Blackfoot Milling Company on or about the same time as the Tuchenhausen claim was cut in the winter of 1892-3; that at the time it was done he did not know that cutting was being done on Lot 9 and that he first learned of it after the commencement of this action when he went over the land and, on doing so, he noted considerable timber had been left standing on both these lots 9 and 10, in accordance with the requirement of leaving 50% of the timber standing where cutting was done under a timber permit—this, in contradistinction to the Tuchenhausen claim, which had been cut clean (Tr. 469-70).

The testimony of the Government witness, Dan Graham, is to the same effect (Tr. 72).

It is obvious that these two lots of 45 acres each do not come within the protection of the Acts of March 3, 1891, as they were cut subsequent to the enactment of said Acts. Lot 10, representing 193,390 feet is frankly an innocent trespass; Lot 9, representing 161,340 feet, the Government claimed was not protected by the timber permit even though covered by it inasmuch as defendant failed to show compliance by Big Blackfoot Milling

Company with the terms of the permit (Instruction Tr. 766-7). Defendant contended that it was for the Government to show that the cutting actually done was not in accord with the terms of the permit (Exception to Instructions Tr. 779; A. of E. No. 6, p. 20, *supra*).

### **Edgar Claim:**

The title to this land is now in the State of Montana, it having been selected by the State under an Act of Congress, by which Montana became entitled to certain lands within its boundaries (Tr. 479). This, of course, was subsequent to the cancellation of the entry of Henry F. Edgar. His claim constituted the S. E.  $\frac{1}{4}$  Sec. 28-14-14. It was stipulated between the parties that Henry F. Edgar filed his Preemption Declaratory Statement Nov. 23, 1885, and date of settlement was Oct. 26, 1885. The Government endeavored to establish, with but scant success that timber was cut from the Edgar claim in 1887, while W. H. Hammond admitted that Edgar and he had cut timber from same in 1885 and in 1886,—but not later. As the claim lapsed and was cancelled, we do not suppose it much matters whether the cutting was in 1887 or earlier, though if at the later date it might be argued that W. H. Hammond was guilty of a wilfull and not an innocent trespass in relation to the cutting, as at the later date the difficulties connected with Edgar's citizenship papers had manifested themselves and the issuance of final receipt was delayed.

Now, the facts concerning Henry F. Edgar and his entry are these: In passing it may be noted that he

bears to Montana the same relation as does Marshall to California in that he was the discoverer of the one time extensive gold placer claims in that state. A fresco of him is prominent at one of the four corners from which the dome of the Montana Capitol Building at Helena arises. He died after this suit was commenced from a cold contracted while visiting Missoula to explain to defendant's representatives the history of his troubles with the claim and unfortunately, so far as this case is concerned, before his deposition could be taken.

W. H. Hammond testified (Tr. 444-5) that the first cutting was done in the winter of 1885-6 and completed in the summer of 1886 and that this cutting was done while he was operating the Blackfoot Mill on his own account. In the winter of 1885-6 Edgar logged the claim himself and W. H. Hammond bought the logs on the bank of the river and in the summer of 1886 the logging was done by W. H. Hammond directly. W. H. Hammond did not recollect how much was paid for the logs he bought on the bank of the river, but he paid \$1.00 a thousand for the stumpage he cut in the summer of 1886.

On May 13, 1886 (Tr. 446) the U. S. Land Office at Helena, Montana, wrote to Woody & Marshall, Edgar's attorneys at Missoula, Montana, returning to them Edgar's final preemption proof, also sent a check for \$400.00 which had theretofore accompanied Edgar's final proof papers when he sent same to the Helena Land Office. The proofs were returned as they did not show Edgar to be a naturalized citizen. W. H. Hammond had known of Edgar going with his witnesses to prove up upon his claim and it was not until the late fall of

1886, after the timber had been cut from the claim, that he learned there was some question about Edgar getting title to the property (Tr. 447).

Edgar's step-son, Frank Foster, testified (Tr. 415-16) to the difficulty Edgar experienced in the matter of his citizenship papers, he having lost the original and the record had been destroyed in a fire at Fergus Falls, Minnesota; also he testified concerning the making by Edgar of his final proof, as did the witness Kilburn, who was one of Edgar's final proof witnesses (Tr. 515).

Notwithstanding the foregoing, Edgar's homestead entry was finally cancelled by reason of the conclusion of the Acting Commissioner of the General Land Office at a hearing to which Edgar was cited to appear, but did not do so, to the effect that the entry was not made in good faith—which conclusion was based upon the report of a special agent (Tr. 723).

There was abundant evidence, some of it from the Government's own witnesses, that considerable cultivation was done by Edgar and his family upon this claim upon which he lived until at least 1889 and that he intended to make of this claim and that it was susceptible of being made into a home for himself and family. In this connection we shall merely refer to the pages in the transcript wherein this evidence is set forth:

Frank Foster, Tr. 409-12;

E. R. Kilburn, Tr. 509;

J. B. Seeley, Tr. 192, 194;

W. H. Hammond, Tr. 479-81.



The claim now made by the Government for the cutting of timber from the Edgar claim furnishes a striking illustration of the hardship and abuse that may arise from the fact that the Government is immune from the plea of the statute of limitations. Whatever the irregularities may have been the Government had almost contemporaneous notice of them.

George H. Reeder, a civil engineer, called as a witness on behalf of plaintiff testified (Tr. 134) that he was employed by M. J. Haley, a special agent of the General Land Office, to run out the lines of Sec. 28, of which section the Edgar claim constituted the S. W.  $\frac{1}{4}$ , for the purpose of investigating the extent of the timber trespass. This was in August, 1886.

Chas. W. Helmick, a civil engineer, called as a witness on behalf of plaintiff, testified (Tr. 133) that in October, 1888, he went over the Edgar claim in company with M. J. Haley and found 1635 stumps.

M. J. Haley, who for eight years was a special agent of the General Land Office, testified (Tr. 164) to his accompanying Reeder and Helmick on the Edgar claim on two several occasions. Haley did not have his notes made at the time as did Reeder and Helmick. Haley understood in 1893 that these cases had been dismissed and probably he or his wife destroyed his notes in consequence. In fact, in 1893 Mr. Ogden, who had charge of fraudulent timber cutting in Montana (Tr. 108-9) discussed with Haley some of these cases, including the Edgar claim and they prepared a statement and signed

it, which recommended the dismissal of the cases on the ground that years had elapsed and it was doubtful about the result of the cases—something of that sort. Later he heard the cases had been dismissed.

If, as we shall hereafter consider, the question of the allowance of interest is affected by the existence of a long and unexplained delay upon the part of a plaintiff in asserting its rights we would beg of the Court to recall specifically this Edgar claim—1886 to 1910—26 years—with knowledge on the part of the plaintiff in 1886.

In 1909 William Greene (Tr. 78) estimated the Edgar claim on behalf of the Government and found 2620 stumps, which he concluded represented 1,557,025 feet. As we have seen, Helmick found only 1635 stumps in 1888 and the Government does not claim that any timber was cut after the time last mentioned. This furnishes a nice commentary on the accuracy of stump counting and estimating therefrom a quarter of a century after the timber has been cut. The process of guess work involved in this *ex post facto* stumpage estimating will be found described in the cross-examination of Dan Graham (Tr. 74-77).

W. H. Hammond testified (Tr. 479) that he did not remember how much timber was cut from the claim—he guessed there was almost a million feet that he and Edgar cut off together.

Anyhow, the cutting occurring prior to 1891 is condoned by the Acts of March 3, 1891.

## TOPIC III.

**THE COURT ERRED IN FAILING TO GIVE CERTAIN INSTRUCTIONS PROPOSED BY DEFENDANT BEARING UPON THE LIABILITY OF DEFENDANT FOR THE TIMBER CUT, AND PARTICULARLY AS TO TIMBER CUT FROM THE EDGAR CLAIM, AND UNDER THE "TIMBER PERMIT"; ALSO AS TO HIS LIABILITY IN CONNECTION WITH THE SO-CALLED "BOYD TRESPASS".**

The charge of the Court in so far as it related to the liability of defendant for the alleged conversions will be found in the Transcript, page 754 (bottom) to page 760 (middle) and while, from its length, it might be thought that the jury was adequately instructed in the premises, nevertheless, we submit that such was not the case. An examination of the charge of the Court on this subject will disclose that the Court attempted to define defendant's responsibility in the premises in the abstract rather than in the concrete as applied to the facts in the case. Anything so elusive and perplexing as are the several elements which may furnish evidence tending to establish the responsibility of one person for the act of another ought, we submit, where possible, to be expressed to the jury in reference to the facts in the case and not in terms of generalities or abstractions. Nevertheless, the Court refused to give the instructions offered by defendant on this subject; A. of E. No. 15, p. 28, *supra*; A. of E. No. 16, p. 29, *supra*; A. of E. No. 22, p. 33, *supra*, and A. of E. No. 23, p. 33, *supra*.

Particularly objectionable was the refusal of the Court to give defendant's requested instruction con-

cerning defendant's responsibility in connection with the so-called "Boyd Trespass", a situation which illustrated the proposition that the liability of defendant for that trespass was by no means based upon the same considerations as would determine the responsibility of Big Blackfoot Milling Company therefor—A. of E. No. 19, p. 31, *supra*. The same thought is true as to the Edgar claim—A. of E. No. 20, p. 32, *supra*, and as to the timber cut under the supposed protection of the timber permit—A. of E. No. 21, p. 32, *supra*.

That the jury was not sufficiently instructed as to the principles that should apply in determining whether or not the defendant was liable for the alleged conversions is evidenced by the action of the jury. After the jury had been deliberating all afternoon and evening, on the following morning it came into Court (Tr. 781) and the foreman stated that the jury would like to have reread to it certain testimony and the instructions of the Court regarding the liability of the members or officers of a corporation. As a matter of fact the desire of the jury for instructions on the law in this particular was never gratified, for they received such scant sympathy from the Court in the matter of the rereading of the testimony that they did not venture to press the Court for the instructions (Tr. 782-785).



## TOPIC IV.

**THE COURT'S INSTRUCTION CONCERNING THE MEASURE OF DAMAGES APPLICABLE AS FOR AN INNOCENT CONVERSION WAS ERRONEOUS, AS WAS ALSO ITS INSTRUCTION TO THE JURY TO ALLOW INTEREST AND IN PERMITTING THE PRAYER OF THE COMPLAINT TO BE AMENDED TO INCLUDE A DEMAND FOR INTEREST. HEREIN IS ALSO CONSIDERED THE SUFFICIENCY OF THE OBJECTIONS OF DEFENDANT INTERPOSED TO THE CHARGE OF THE COURT IN THESE PARTICULARS.**

As to the measure of damages and the awarding of interest the Court instructed the jury (Tr. 769-70, 776) as follows:

“(a) It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of \$211,854.10. But should you find that plaintiff is entitled to recover, you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate, and that is always subject to control by the evidence in the case.

If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.

(b) If you find that the defendant, or any of the said corporations while acting under his direction and

control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.

(c) In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time. \* \* \* The rate of interest is the legal rate of seven per cent."

The first two paragraphs of this instruction, designated by us by the letter (a), constitute the Court's direction as to the principles applicable to the theory of defendant's responsibility as a willful trespasser; the third paragraph, for convenience designated (b) the rule of law applicable to the theory of an innocent trespass, and the last paragraph, for convenience designated (c) the direction by the Court to the jury to award interest.

That portion of the instruction (a) treating of the conversion as a willful one is assigned as error (A. of E. No. 8; pp. 23-24, *supra*) and we shall not here extend the discussion of the grounds of error which are specified in said assignment, as the vice in that portion of the instruction, namely, that defendant would necessarily be liable as for a willful conversion, if any of the third

parties for whose acts it is claimed he is responsible were so liable, has already been considered under Topic III herein, in connection with the failure of the Court to instruct the jury specifically in reference to the concrete facts and as to what they must find in order to hold the defendant liable for the acts of others.

We shall, therefore, pass to a discussion of that portion of the instruction (b) and so far as interest may be considered as an element of damages, that portion, (c) defining

**1. The measure of damages as for an innocent conversion.**

The instruction defining the measure of damages as for an innocent conversion is assigned as error (A. of E. No. 9, p. 25, *supra*) and the grounds of such error are there specified.

We contend that as an abstract proposition of law this instruction was erroneous, as we insist that the law is well settled that the true measure of damages under such circumstances is the stumpage value of the standing timber and not the price for which the lumber manufactured therefrom is sold in the market, less the expenses incurred in the manufacture of such lumber.

At the threshold of this inquiry we are confronted by the question as to what law, statutory or otherwise, should furnish the measure of damages in this case. It is mainly in reference to the question of the allowance of interest that this consideration becomes of importance, for it will be seen there is virtually a unanimity, among the Courts, Federal and State, as to what, out-

side of the question of interest, is the proper measure of damages in cases of an innocent conversion.

Here we have a conversion committed in Montana from and including the year 1885 to and including the year 1894. We contend that

(A) **The law of Montana existing during the period of the conversion should furnish the measure of the defendant's responsibility,**

not the law existing in Montana at a later date, or that prevailing in California at any time. In the recent case of

Western Union Tel. Co. v. Brown, 234 U. S. 542;  
58 L. Ed. 1457,

it was held that the legal responsibility for negligent failure to deliver a telegram must be determined by the law in force where the act of negligence was committed and not by that of the forum. In delivering the unanimous opinion of the Court Mr. Justice Holmes said:

“Whatever variations of opinion and practice there may have been, it is established as the law of this Court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere and that is not only the ground but the measure of the maximum recovery (citing cases). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious.”

Said the same learned Justice, speaking for the Court in the case of

Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 480;  
56 L. Ed. 274-6:



“But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the Court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liability of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356. See *Bean v. Morris*, 221 U. S. 485-487. That, and that alone, is the foundation of their rights.”

See also:

*Northern Pacific Railway Co. v. Babcock*, 154 U. S. 190; 38 L. Ed. 958;

*Northern Pacific Railroad Co. v. Mase*, 63 F. 114; 11 C. C. A. 63;

*Erickson v. Pacific Coast Steamship Co.*, 96 F. 80.

Wharton, *Conflict of Laws*, Sec. 478 C., Vol. 2.

(B) The only possible alternative to the applicability of the Montana rule as it existed during the period of the conversion, is the rule worked out by the Federal courts for the conversion of timber growing upon the public domain in cases in which the government is a party.

As we have seen, it is settled law in the Federal Courts that in suits between private individuals for torts, the *lex loci* and not the *lex fori* will control, where the matter is regulated by statute at the *lex loci*. If the matter be not regulated by statute at the *lex loci*, but is dependent upon general principles of the common law,

then the Federal Courts will not necessarily follow the decisions of the particular state, but will for themselves seek out the true rule.

Northern Pacific R. R. Co. v. Mase, 63 F. 114;  
11 C. C. A. 63.

So it was held by our own Circuit Court of Appeals that in an action for alienating the affections of plaintiff's wife punitive damages would be permitted in the Federal Court in the State of Washington, although the State Court in the absence of any statute on the subject had repudiated the doctrine of punitive damages. The Federal Court felt bound to permit punitive damages as in the absence of a statute on the subject in the State of Washington, the Federal Court, sitting in that State, would follow its own conception of the "principles of general jurisprudence".

Woldson v. Larson, 164 F. 548; 90 C. C. A. 422.

We shall hereafter show that a statutory measure of damages existed in Montana (at least so far as concerns the element of interest) throughout the period of the conversion and also thereafter from 1895, when the State of Montana took over bodily the California Codes, until the present time, and there can be no doubt but that as between private individuals the Montana statute existing during the period of the conversion would control. We think it controls in the case at bar to the extent that the subject is covered by statute, namely, as to the allowance of interest: In other respects there seems to be no reason why the rule worked out by the Federal Courts as applicable to the unlawful, but innocent conversion of timber from the

public domain wherein the Government is the party plaintiff, should not control, and there are many cogent reasons why such law should apply. The damages which accrue to the Federal Government when its timber is taken are not always to be measured by the same standard that prevails between private individuals. The Government does not hold its timber lands for mere profit, and value to the Government is not to be measured by a standard of mere dollars and cents. Larger questions of public policy, on the one hand conservation for the protection of water sheds, conservation for the benefit of present and future generations, and the like—are involved. On the other hand considerations making for the welfare of the community, such as the development of the community resulting from the cutting and use of timber, which are immaterial factors as between private individuals, may legitimately find a place in the molding of the Government's policy. It hardly seems proper, for instance, that a trespass upon a Government reserve in one state should give rise to penalties different from those which would prevail in another, or that the Government in this particular should be at the mercy of state legislators, whose statutory measure of damages might be as various as the states themselves, and as different as the views of the several communities on questions of conservation. An interesting question, therefore, arises, viz.: Is the Government to be bound by the statutes of the several states fixing the measure of damages in cases of conversion, or will it carve out and has it carved out for itself a measure of damages applicable in cases of this character?

That there are many statutory rules laid down by states, which will not be binding upon the United States, is notorious. Thus a state statute of limitations will not bind the Federal Government. If it did, the United States could not maintain the action at bar, for it would be barred by the statute of limitations of Montana.

U. S. v. Thompson, 98 U. S. 488.

The United States cannot be sued without their consent.

U. S. v. Clark, 8 Peters 436.

If the Government itself sues, no judgment can be rendered against it, either on a counter-claim or for costs.

United States v. Boyd, 5 Howard 29.

A judgment in favor of the United States cannot be enjoined.

Hill v. U. S., 9 Howard 386.

Many other instances might be enumerated. In the case first above cited, United States v. Thompson, *supra*, it is said:

“There are thirty-eight states in the Union. The limitations in like cases may be different in each State and they may be changed at pleasure from time to time. The Government of the Union would, in this respect, be at the mercy of the States. How that mercy would, in many cases, be exercised, it is not difficult to foresee.”

So, too, in certain states where the timber conservation policy of the Government is not popular, it is entirely possible to foresee analogous difficulties were



the state legislators permitted to lay down a measure of damages binding upon the Government.

So much for the general principle. Apart from it, it seems clear that, in any event, a state statute will not affect the United States in maintaining its actions, unless it declares in terms that it includes the United States Government.

United States v. Bean, 120 Fed. 719, was an action brought in Montana by the United States Government against the executrix of Marcus Daly for the conversion of timber by Daly in his life time. It was contended that no suit could be maintained because the Montana statute required that there first be presented a claim against the estate, and the complaint failed to allege that the Government had done this.

Knowles, District Judge, said:

“The question arises as to whether or not the United States can be incumbered in maintaining its actions by any state law. I am inclined to believe that they cannot, unless specially named therein, and the demurrers are, therefore, overruled.”

We have thus ventured to express the other side of the question as to whether or not state statutes will control in cases with such a subject matter to which the United States is a party. In any event it will be found that the rule given in the instructions is utterly at variance with the rule formulated by the Federal Courts.

(C) The Montana statute concerning the measure of damages for an innocent conversion as it existed during the period embraced by the conversion.

Aside from the question of interest it was not until 1895, that Montana had a statutory measure of damages applicable to cases of conversion. As respects the allowance of interest the state of the Montana law until 1895 is shown in *Palmer v. Murray*, 8 Mont. 312; 21 Pac. 126, decided in 1889. The opinion of the Court says (p. 127):

“The complaint alleges that the defendant wrongfully carried away and converted to his own use certain personal property of the plaintiff, to her damage in the sum of \$4500, for which she prays judgment, with interest from the date of conversion. \* \* \* The demand is for damages, with interest thereon, and whether it is a demand in trover or replevin, it still retains the character of a suit sounding in damages, and is most certainly for an unascertained, and therefore unliquidated, demand  
\* \* \*

“We have no doubt that it was never the intention of the law to allow interest on demands for damages from the date of the act complained of, but only from the date of damage when ascertained by judgment.”

In 1880 the case of *Randall v. Greenhood*, 3 Mont. 512, was decided, in which the demand was for damages for conversion, and, interest being allowed from the date of conversion, “it was stricken out as not permissible under the statute”.

Concerning this case and the statute in question, it was said in *Murray v. Palmer*, *supra*:

“This construction of the statute is under the well-known rule of interpretation found in the maxim of *inclusio unius est exclusio alterius*. Having specified the

cases in which interest shall antedate the judgment, the natural conclusion is that the law-maker intended to exclude or deny the right in instances not so enumerated  
 \* \* \* The matter is purely one of statutory construction; and after the lapse of 16 years we do not think it wise to disturb the practice thereon."

In this case there was a vigorous dissenting opinion, in which McConnell, C. J., argued in favor of the rule, that the value of the property at the time it is converted, with interest thereon to the date of judgment should control. He contended that "the interest is an integral part of the damages, and is so allowed as a part of the indemnity to which the plaintiff is entitled, and is not given as interest *eo nomine*, in the statutory sense of the word". He was, however, overruled by a majority of the Court, and, as we have seen, it was held that the measure of damages was the value at the time of conversion *but without any interest* prior to the date of judgment. Such was the rule prevailing in Montana at the time of the conversions alleged in the complaint in the case at bar. Measured by that rule, the instruction given by the Court was obviously erroneous.

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Upon the argument of the motion for a new trial, the Government's counsel took the position that the statutory law of Montana and of California had no bearing on the question under discussion. That the California law is inapplicable we, ourselves, concede, as also do we take the position that the Montana statutory law enacted subsequent to the conversion is a

false quantity. As to the latter question it is surely elementary law that years after the commission of a conversion the measure of damages could not be changed by statute so as to confer a new and additional right upon the plaintiff at the expense of defendant.

Beale's Interpretation of Laws, (2nd ed.) pp. 414 et seq.

It is to be noted, moreover, that a statute allowing or disallowing interest in cases of conversion, establishes an absolute right. It is not a mere matter of the remedy. Thus, in *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 538; 52 L. Ed. 606, the statute of Oklahoma, fixing the measure of damages in cases of conversion,—*a statute identical with that of California, and with that in force in Montana since 1895*,—the United States Supreme Court says:

“\* \* \* In the absence of statute the general rule is that in actions for tort the allowance of interest is not an *absolute right*; \* \* \* but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other states have done the same.”

“The elements and measure of damages for a tort, statutory or non-statutory, are generally regarded as matters of substance rather than of remedy.”

Wharton, Conflict of Laws, Vol. II (3rd Ed.),  
Sec. 478c.

See, also,

*Western Union Tel. Co. v. Brown*, supra, 234  
U. S. 542; 58 L. Ed. 1457;

*McCormick v. Penn. R. R. Co.*, 49 N. Y. 315.



Furthermore, the Montana statute adopted in 1895 was expressly declared to be prospective only in its operation.

In view of the position taken by opposing counsel upon the motion for a new trial we shall not burden the body of this brief with a discussion of the California law, or that prevailing in Montana subsequent to the conversion, but in the event the matter should be deemed of interest by the Court it will be found in Appendix I hereto. It is enough to say that except as regards the matter of interest the measure is the same as that applied in the United States Courts and throughout the State Courts generally.

**(D) The measure of damages applied in the Federal Courts to cases of innocent conversion of timber growing upon the public domain in which the United States is a party.**

The latest case upon the subject, decided by the United States Supreme Court Feb. 23, 1904, is *United States v. St. Anthony R. R. Co.*, 192 U. S. 524; 48 L. Ed. 548. In that case the Court says (p. 541):

“The further question is as to the time when the value of the timber is to be ascertained.

“The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was \$1.50 per thousand feet and the value upon delivery to the defendant was \$12.35 per thousand feet. The delivery to the defendant was made by the Thompson Mercantile Company with which the railroad company had entered into a contract to be supplied with the necessary ties and timbers for the construction of its road, and in such contract the mercantile company was, by the ex-

pressed terms thereof, appointed the agent of the defendant, and in that capacity it was authorized by the defendant to cut timber for the purpose mentioned. The mercantile company did cut the timber on the lands, which it in good faith supposed were adjacent to the line of the railroad, and delivered such timber to the railroad company upon the line of its road. *We think the measure of damages should be the value of the timber after it was cut at the place where it was cut."*

The Court then refers to two previous cases, *Wooden-Ware Company v. United States*, 106 U. S. 432; 27 L. Ed. 230; and *Pine River Logging Company v. United States*, 186 U. S. 279; 46 L. Ed. 1164, saying (p. 542):

"In both of those cases the parties doing the cutting did it willfully and in bad faith. \* \* \* In the *Pine River Logging* case, the parties to the contract were held liable for the full value of the timber after it was cut and had increased in value by reason of the labor expended upon it by the parties who did the cutting. This was on the ground that they were willful trespassers, acting in bad faith, and ought to be made to suffer some punishment for their depredations; but it was stated that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, *the value of the property when first taken must govern."*

*United States v. St. Anthony R. R. Co.*, 192 U. S. 524; 48 L. Ed. 548.

Referring to the conversions committed by the defendant, *St. Anthony Railroad Company*, the Court says:

"\* \* \* there was no intention on the part of the defendant to violate any law or to do any wrongful act. This, we think, clearly takes the case out of the principle of those above cited, *and the measure of damages must, therefore, be the value of the timber at the time and at the place where it was cut."*

The measure of damages thus laid down by the Supreme Court of the United States, in a case concerning the Government's timber, is, we submit, conclusive in the case at bar. That measure is utterly at variance with the rule laid down in the instruction of which we are here complaining.

The rule as announced by the Supreme Court of the United States measures the damages by the value of the timber at the time and place where it was cut. The instruction complained of tells the jury that the measure was the selling price of the lumber, less cost of manufacture. The conversion by the St. Anthony Railroad Co. had taken place in 1899. Judgment was not rendered until five years later. The measure of damages fixed by the Supreme Court of the United States allows no interest. The instruction here complained of tells the jury that they must allow interest.

We now turn to the cases in the Federal Courts, other than the United States Supreme Court, decided prior to this case.

In *United States v. Northern Pacific R. R. Co.*, 67 Fed. 890 (decided May 11, 1895), the judgment was rendered on \$9.00 per thousand feet, the value of the manufactured lumber at the market. The defendants petitioned for an order setting aside the judgment, upon the ground that the value of the standing timber, before an increased value had been added, was the true measure of damages. Judge Gilbert granted the motion saying (p. 891):

“The Supreme Court, in *Wooden-Ware Co. v. U. S.*, 106 U. S. 434, has declared the doctrine that ‘where the tres-

pass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.' This case comes clearly within the rule thus defined. \* \* \* The testimony shows that the value of the standing timber at the time it was cut was about seventy-five cents a thousand feet. \* \* \*"

The judgment entered in favor of the United States for \$2,095 was accordingly set aside, and a judgment for \$220 and costs was entered in lieu thereof. It will be noted that no interest was allowed.

In *U. S. v. English*, 107 Fed. 867, Judge Bellinger, in a case tried without a jury in the Circuit Court, District of Oregon, decided April 4, 1901, applied the value of the wood in the tree at the rate of 50 cents per cord holding the conversion to be an innocent one, it appearing that the cord wood, to recover the value of which the action was brought, was worth on the ground \$1.50 per cord and at the mill \$3.00. No interest was allowed.

In *Gentry v. United States*, 101 Fed. 51, 41 C. C. A. 185, decided in 1900, the Circuit Court of Appeals for the Eighth Circuit, holds that the measure of damages is "the value of the timber in its original place, or, in this case, for one dollar per one thousand feet, and for no more".

In *United States v. Teller*, 106 Fed. 447, 451; 45 C. C. A. 416; decided in 1901 by the United States Circuit Court of Appeals, Eighth Circuit, the instruction considered was as follows:

"However, if you should find from the evidence that some ties were cut, but that the defendant was an unintentional or mistaken trespasser, then the amount to be deducted would be their value at the time they were so



cut, less the amount which he or his employees have added thereto by their labor; in other words, the value as they stood in the tree, which the testimony tends to show was about three cents per tie."

The Court said (p. 451):

"The charge of the Court, being correct in law (*Bolles Wooden-Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Golden Reward Min. Co. v. Buxton Min. Co.*, (C. C.) 79 Fed. 868) was warranted by the proof, and no error was thereby committed."

In *United States v. Van Winkle*, 113 Fed. 903; 51 C. C. A. 533; decided in 1902, the United States Circuit Court of Appeals, for the Ninth Circuit (Gilbert, Ross and Morrow, JJ.) said:

"If he acted in good faith, the court required the verdict of the jury to be for the value of the timber as cut, and not as manufactured. *Gentry v. U. S.*, 101 Fed. 51; 41 C. C. A. 185."

By the language "the value of the timber as cut" the Court meant the value of the timber in the tree—stumpage—for, as we have seen, such is the ruling in the *Gentry* case cited by the Court.

In *United States v. Homestake Mining Co.*, 117 Fed. 481, 482; 54 C. C. A. 303, decided in 1902, the Court of Appeals for the Eighth Circuit declared that

"the limit of the liability for damages of one who takes ore or timber from the land of another without right through inadvertence, or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees", citing numerous authorities.

In *Powers v. United States*, 119 Fed. 562, 567; 56 C. C. A. 128, decided in 1903, by the Circuit Court of Appeals for the Sixth Circuit, it is said that

“when the defendant is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of the conversion, less the amount which he or he and his vendor have added to its value, constitutes the measure of damages.” (Citing many cases, among them, *U. S. v. Van Winkle and Gentry v. U. S.*, *supra*.)

The time of conversion here referred to is, under the decisions cited as well as the decisions of the United States Supreme Court,—notably *U. S. v. St. Anthony R. R. Co.*,—the time when the tree is severed from the freehold. Up to that point the amount which the innocent trespasser has added to its value is the cost of severance. The value at the time of conversion is, therefore, the stumpage value plus the value given to the tree by the cost of severance, less the amount expended for the purpose of accomplishing the severance. In short, it is the stumpage value as indicated in the above decisions.

The case of *U. S. v. McKee*, 128 Fed. 1002, 1005, was decided by Judge De Haven March 25, 1904, just four weeks after the decision by the Supreme Court of the United States in the case of *U. S. v. St. Anthony R. R. Co.*, *supra*, and so short a time elapsing between the two decisions it is perhaps fair to assume that Judge De Haven's decision was not influenced by the rule in the *St. Anthony* case. He said:

“My conclusion, therefore, is that the evidence is not sufficient to justify the Court in finding that the trespass

was a willful one, and, as it was not, the Government is only entitled to recover the value of the bark in place upon the tree; that is, its stumpage value."

The evidence in this case well illustrates the circuitous methods that sometimes have to be adopted by the Courts in *determining the value of the timber as it stands in the tree* and accounts for the round-about way in which the rule declaring the measure of damages in cases of innocent conversion has sometimes been expressed, with the evident end in view of determining the value of the timber as it exists in the tree—the stumpage value. Where this is the case the Court has to work backwards from the value of the finished product, eliminating one by one the several elements that contribute to the value of the finished product—the residue constitutes the stumpage value. Thus—in this case—United States v. McKee, *supra*,—a witness made an estimate of the stumpage value. This the Court adopted, stating that such

"estimate was evidently based upon the selling price of the bark at the point of shipment, the cost of hauling, cutting and peeling, and the allowance of a reasonable profit for carrying on the business of placing it upon the market. In the absence of direct evidence upon the market price paid for bark upon the standing tree, these were all proper matters for consideration in fixing a reasonable stumpage value".

We invite the attention of the Court to the deliberate and very proper inclusion of the element of profit as an item of value with which the defendant should be credited.

All of the foregoing cases, with the exception of the last, were decided prior to the decision rendered in 1904

in *United States v. St. Anthony R. R. Co.*, 192 U. S. 524; 48 L. Ed. 548. Whether that case intends to allow the value in the tree or the value immediately upon severance is perhaps debatable. The only cases decided in the Federal Courts since that time adhere to the rule of stumpage value. Thus in *Morgan v. United States*, 169 Fed. 242; 94 C. C. A. 518, decided in 1909, the Circuit Court of Appeals for the Eighth Circuit, says (p. 249):

“If the defendant went upon the land and cut and removed the timber in good faith, believing that he had a right thereto, he was only answerable in damages for the stumpage value thereof, and not for the manufactured value. This is the universally recognized rule of law.”

And the Court approved an instruction in so far as it defined the measure of damages for an innocent conversion as constituting “the value of the trees as they stood in the forest”.

In the case of *Lynch v. United States*, 138 Fed. 535; 71 C. C. A. 59, tried in Montana, for conversion of timber from the public domain in that state, decided by the Circuit Court of Appeals for the Ninth Circuit in 1905, the jury was instructed that if the conversion was an innocent one the Government was entitled to recover “merely the value of the timber as it stood on the land before being cut”.

In the recent case of *H. D. Williams Cooperage Co. v. U. S.*, 221 Fed. 234, decided by the Circuit Court of Appeals for the Eighth Circuit March 1, 1915, it was held that in the case of an innocent conversion the measure of damages was “only for the value of the timber in its original place”.



In the recent case of *C. A. Smith Timber Co. v. Auld*, 218 Fed. 824, decided by the Circuit Court of Appeals for the Eighth Circuit Nov. 25, 1914, the Court stated (p. 826) that

“the charge of the trial Court correctly set forth the measure of damages, if the jury believed Sand’s trespass and conversion were due to mistake or inadvertence.”

Recourse to the Transcript of Record in that case as it was before the Circuit Court of Appeals for the Eighth Circuit shows at page 142 that the trial Court instructed the jury as follows:

“Now, if from the evidence you believe in this case that there was a cutting in good faith by Mr. Sands, that is, that he cut that timber in the honest and reasonable belief that he had a right to cut it, then there can be no recovery in this case, except for nominal damages and that recovery would have to be against all of these defendants, because under this testimony there can be no question but that all of these defendants did, subsequent to the cutting of this timber, exercise the right of possession and dominion over the property of these Aulds, this timber. But the reason why there can be no recovery except for nominal damages, that is for a dollar, or some insignificant sum like that, is that the plaintiffs have failed to prove the stumpage value of that timber, and, in the case of a cutting in good faith, neither Sands, nor any of the other defendants, would be liable for more than the stumpage value, and there being no proof of what the stumpage value was there can be no recovery, except for nominal damages, because we don’t know what the extent of the damage was.”

It is interesting to note that the Land Department of the United States, after a very able and thorough review of all the authorities, has reached the conclusion that the rule laid down in *United States v. St. Anthony R. R. Co.*,

supra, is the rule by which the Land Department must be guided, and that that rule fixes the measure of damages, in cases of innocent conversions, at the value of the timber after it has been severed from the soil, and not its stumpage in the standing tree. After reviewing the prior practice of the Department, which had fixed the measure at the stumpage value, the Commissioner says, under date of April 1, 1912:

“This office, therefore, in view of the rule laid down in the St. Anthony Railroad Company case by the United States Supreme Court, which is the highest authority, concludes that in all cases of innocent trespass where the timber has been converted by the trespasser or innocent vendee from such trespasser, the measure of damages should be the value of the timber after same has been severed from the soil, instead of the stumpage or standing value of the timber as has been the rule in previous cases.

Decisions of the Department of the Interior Relating to Public Lands, Vol. 40, p. 525.

It is also interesting to note that precisely the opposite conclusion was reached by Judge Lowell, in a case, however, to which the Government was not a party,—*Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 89. After reviewing all the authorities, including *United States v. St. Anthony Railroad Co.*, supra, Judge Lowell concludes (p. 106) that the weight of authority “supports the allowance of stumpage only”—i. e. value before severance.

Upon the hearing of the motion for a new trial plaintiff's counsel took the position that in this case Judge Lowell recognized that the Supreme Court of the United States had never expressly considered the distinction

between the stumpage value and the value that may be reckoned by deducting the cost of manufacture from the finished product. Such, however, is not the case. What he does say is this (p. 106):

“In *United States v. St. Anthony R. R.*, 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548, the parties had agreed that the value of the timber where cut was \$1.50 per thousand, and upon delivery to defendant was \$12.35. The Court held that the cutting was in good faith, and said, ‘We think the measure of damages should be the value of the timber after it was cut at the place where it was cut’. Page 542, 192 U. S., p. 339, 24 Supt. Ct., 48 L. Ed. 548. While the language thus used by the Supreme Court, upon the whole, approves as measure of damages *the value of the logs immediately after their separation from the freehold*, it is plain that the difference between *this value* and *stumpage* has never been expressly considered by that Court.”

The only question which Judge Lowell was there considering was whether the measure, in cases of innocent conversion, was the stumpage value in the standing tree or the value immediately after severance,—in other words, whether the value added by the labor of severance should be deducted. It is of this that the learned Judge says that

“it is plain that the difference between *this value* and the *stumpage* has never been expressly considered by that Court.”

And the learned Judge concludes by saying that

“the weight of authority outside the Supreme Court, on the whole, *supports the allowance of stumpage only.*”

Counsel for the Government seeks to have the Court adopt both a time and place of conversion absolutely

different from that laid down by the United States Supreme Court. The instruction complained of told the jury to assess the damage by deducting from the *selling price* the *cost* of manufacture.

In other words, the instruction states the time and place of *sale* as the time and place of conversion, and arrives at the net damage by deducting the cost of manufacture from the selling price. This difference includes both stumpage value and manufacturer's profit.

But the United States Supreme Court has sanctioned no such rule. It has expressly said that:

1. The *time* when the value is to be ascertained is *the time when the timber is FIRST cut*.

2. The *PLACE* where its *value* is to be determined is *the place where it is cut*.

This the United States Supreme Court has said, not obscurely, but in unmistakable language. That language will not admit of the construction that the value is to be determined at a different place and at a much later time,—long after the logs have been transported to distant mills and there transmuted into lumber, and again shipped to a chain of lumber yards and there sold.

It developed upon the hearing of the motion for a new trial that the necessities of counsel for the Government in endeavoring to find authority for the instruction given by the Court were such that they boldly assailed the rule laid down in the St. Anthony Railroad case, *supra*, as *dictum* and in a like manner they attempted to brush aside the mass of decisions in the Federal Courts which follow the St. Anthony case or



which had previously laid down the same rule. But what the United States Supreme Court there said is not *dictum*. There is no ambiguity in the language actually used by the Supreme Court. It says what we say it says and lays down the rule for which we contend.

One of the learned counsel for the Government told the trial Court that he once had occasion personally to examine the judgment roll in the St. Anthony case and that he found there was no question raised as to what was the proper measure of damages in a willful or in an innocent trespass. He further said that, in that case, "the parties stipulated, and the stipulation was made a part of the record, that if the defendant railroad company was a willful trespasser it was liable for the manufactured value of the timber at \$12.50 per thousand; that if it was an innocent trespasser it was liable for the value of the timber immediately after severed from the soil at the rate of \$1.50 per thousand."

If this were all true, it would be asking a great deal of this Court to urge it to ignore the clear and explicit words of the United States Supreme Court and to assume that the Supreme Court misunderstood the record and did not know what it was talking about.

But, in fact, counsel's recollection is absolutely faulty in the particulars just quoted. The record contains no such stipulation as he there refers to, and the *fact is that the question was directly raised as to what was the proper measure of damages in a willful or in an innocent trespass.*

It may be that this argument will not now be advanced by plaintiff's counsel before this Court, but as we may

have no opportunity of reply to same if it be again put forward, we feel it incumbent upon us at this time to place within the easy reach of the Court just what the record in that case does disclose. Excerpts therefrom and our comments in relation thereto will be found in Appendix II at the end of this brief.

There is nothing said, even by way of *dictum* in any case ever decided by the United States Supreme Court which indicates a different rule than that the measure of damages in cases of innocent conversion is the value of the timber converted *at the time and at the place where it is cut*.

Wooden-Ware Co. v. United States and Pine River Logging Co. v. United States, *supra*, contain *dicta* entirely in harmony with the St. Anthony Railroad case. As is pointed out in the latter case, both of these cases were concerned with timber which had been cut willfully and in bad faith. Anything said therein with regard to the measure of damages in cases of innocent trespass is of course *dictum*. But what was actually said in Wooden-Ware Co. v. United States (106 U. S. 434; 27 L. ed. 230), was this:

“On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property *when first taken* must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.”

(And this language was repeated substantially in the Pine River Logging case, 186 U. S. 279; 46 L. ed. 1164.)

Counsel seem to think that the three last lines above quoted are favorable to their contention. But it should be noted that the result of the rule is, that the amount of the recovery is the same whether the suit is brought for the innocent conversion of *logs* or for the innocent conversion of the finished *lumber*.

The language of the Supreme Court is that the defendant is to be credited with the "*value*" which his labor has added to the timber. It does not say that he is to be credited with the mere cost of the labor which has gone into the lumber. The *value* which his labor has added is a very different thing from the mere cost of that labor. The labor gives the lumber a market value, and that market value includes the manufacturer's profit. The difference between the stumpage value and the market value of the lumber is "the value which has been added by the work of the defendant", to which the Court refers.

The following quotation is in point in this connection and makes the matter very clear:

"The measure of damages in this case should be the value of the timber on the stump, as it was in its natural state and position. This may be ascertained by starting and ending with the value on the stump, as the simplest and most direct way. If, however, in trying to arrive at such value, we start with the market value of the lumber at the mill, we should be careful to deduct not simply the cost of converting the timber into lumber, but the value added to the value of the timber on the stump by the time, skill, labor and expenditures employed in the process of manufacture. *If, therefore, the market value of the lumber at the mill includes any profits of manufacturing, such profits must be deducted; otherwise you would give the plaintiffs not only the value of the*

timber on the stump, but, in addition thereto, the profits of manufacture, which enter as an element of market value under normal conditions.”

Lewis v. Virginia-Carolina Chemical Co., 69 S. C. 364; 48 S. E. 281.

In principle this is obviously as it should be. *What possible reason could there be to make the innocent trespasser suffer more in the one case than in the other?* The law, in such cases, aims to give compensatory, not punitive, damages.

The actual damage to the owner of the land, in the case of an innocent trespass, is exactly the same whether he sues immediately after severance or after the timber has been sawed into lumber. If the trespass is innocent the owner is entitled to compensation and no more. He is entitled to nothing by way of punishing the defendant, and it would be an utter absurdity for the law to allow him a greater net sum if the innocent trespasser makes lumber than if he makes logs!

Upon the hearing of the motion for a new trial there was not a single case cited by counsel for the Government which even tends to sustain the instruction of the Court here, unless it be *Winchester v. Craig*, 33 Mich. 205. In that case it appeared that the value of the standing timber was \$1.50 per thousand feet, and that the value of the logs in Detroit was \$12.00 per thousand feet. The Court instructed the jury to allow the market value at Detroit, less the sum of money which the defendants had expended in bringing it to market. This instruction was complained of by the *plaintiff*, who insisted that he was entitled to the value at Detroit



without deduction, and plaintiff appealed on that ground; but the Supreme Court of Michigan held that the instruction was "*as favorable as the plaintiff had any right in this case to expect*" (p. 215).

And the Court continues (p. 215):

"This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit upon what they had done, but protected them to the extent of the advances they had made; and this, we think, was correct."

The remark of the Court that "this, we think, was correct", is pure *dictum*. It would have been a direct authority if the *defendant* had objected to the instruction as improperly allowing the recovery of his manufacturer's profit; but, since the plaintiff—not the defendant—was complaining, and since the instruction was "*as favorable as the plaintiff had any right in this case to expect*", the remark that it was correct not to permit the defendants to recover (retain) any profit, was mere *dictum*. The objection to the instruction is that it was too favorable to the plaintiff, and it is to be noted that in the vast number of cases reviewed in the opinion in *Winchester v. Craig*, not one is cited which would sustain the rule giving over to the plaintiff not only the value of the goods when converted, but the profits thereon as well.

The important thing to be noted with regard to *Winchester v. Craig* is that it stands virtually alone in the jurisprudence of the United States in what it says about profit.

Winchester v. Craig was decided in 1876. Judge Cooley, as counsel point out, participated in the decision. The opinion was by Marston, J. Of the four Justices who participated, Chief Justice Cooley concurred. Campbell and Graves, JJ., concurred in the result *but not in the opinion*. Its authority is much weakened, to say the least, by a later Michigan case in which Judge Cooley also participated. On June 10, 1885—nine years later—the Supreme Court of Michigan, in *Ayers v. Hubbard*, 23 N. W. 829 (all the judges concurring), in effect overruled *Winchester v. Craig* on the particular point in controversy. It appeared there that the defendant's firm, owning some timber land, let a contract to one Montgomery to cut logs and timber during the winter, and haul and put the same afloat in Willow Creek for the aggregate price of \$3.50 per thousand feet. Montgomery, it seems, through innocent mistake, cut over the plaintiff's line.

The Court said (pp. 829, 830):

“It appears from the testimony that the land of plaintiff, from which the timber was taken, sought to be recovered for, is about three and one-half miles from Willow Creek, at the point where Montgomery delivered them to the defendant, and the plaintiff claims that he should recover the value of the logs at that point delivered in the creek. The defendant, on the contrary, insists that the conversion, if any, was by his servants in the woods where the timber stood upon plaintiff's land, and that the damages for which he was liable, if any, was the value of the stumpage. The court instructed the jury in accordance with the views of plaintiff's counsel, and the verdict of the jury was rendered accordingly. \* \* \*

“We think the circuit judge erred in his instruction to the jury. We discover nothing in the case indicating any willful or negligent trespass upon the part of the defendant or the company’s employees. The general rule of damages is the value of the property lost under such circumstances *at the time and place of conversion*. The declaration avers plaintiff’s possession of the land, and the ownership of the property taken, and that upon the land the property was taken, and there came to the possession of the defendant by finding, and on the same day and place the defendant converted the same. The record shows this declaration supported by the proofs. Complete indemnity for the actual loss sustained in this case by the plaintiff is what he was entitled to recover. \* \* \*

“\* \* \* The judgment must be reversed and new trial granted.”

**(E) The rule adopted by the United States Supreme Court is the rule which prevails in most of the states.**

The decisions of most of the state Courts, in suits between private individuals, accord with the rule adopted by the United States Supreme Court in Government timber cases. In other words, the Government, acting through its Courts, has seen fit to adopt in its own cases the same rule which is recognized by the great weight of authority as the proper rule to apply to cases between individuals. If we concede that the Supreme Court of the United States might adopt a different, and even more stringent, rule for cases wherein the Government is a party, the point is that it has not done so. This Court must, of course, follow the United States Supreme Court, whatever its own views may be as to the proper measure.

The following cases are among those which show how general the rule is which the Federal Courts have elected to apply to conversions of Government timber:

*Minnesota:*

King v. Merriam, 38 Minn 47;

State v. Shevlin Carpenter Co., 62 Minn. 99.

*Washington:*

Chappell v. Puget Sound Co., 27 Wash 63.

*Mississippi:*

Bond v. Griffin, 74 Miss. 599.

*New York:*

Clark v. Holdridge, 12 App. Div. 613.

*South Carolina:*

Lewis v. Virginia-Carolina Co., 69 S. C. 364.

*Texas:*

Young v. Pine Ridge Lumber Co., 100 S. W. 784.

*New Hampshire:*

Beede v. Lamprey, 64 N. H. 510.

*Pennsylvania:*

Forsyth v. Wells, 41 Pa. St. 291.

*Alabama:*

White v. Yawkey, 108 Ala. 270.

*Maryland:*

Blaen Co. v. McCulloh, 59 Md. 403.

*Wisconsin:*

Weymouth v. Chicago R. R., 17 Wis. 550.

*Massachusetts:*

Saunders v. Clark, 106 Mass. 331.

*Vermont:*

Tilden v. Johnson, 52 Vt. 628.



(F) It is a fallacy to contend that the application of the rule of stumpage value permits a wrong-doer to profit by his own wrong.

With the overruled *dictum* of an early Michigan case as the only precedent to support the instruction given by the trial Court we naturally expect the proposition to be advanced that if the wrongdoer is credited with the cost of manufacture, he should not object to pay stumpage value plus the profits made (if any) in his wrongful enterprise. This contention is most readily answered by the consideration already adverted to that it ordinarily is the function of Courts to award *compensation* only to the injured party and this is ordinarily achieved where stumpage value is allowed. If by the severance of the trees there is injury in some form or other to the freehold the injured person can by suing in trespass *quaere clausum fregit* recover, in effect, the value of the stumpage plus such additional injury as may have resulted to his freehold. Thus, by one method or the other, without attempting to transfer from the pocket of the wrongdoer to the injured person the profits the former may have apparently made—a matter involving considerable speculation—is compensation placed within reach of the injured person. An awarding of any greater amount than what is compensation must necessarily rest on the theory of punitive damages, since damages are of but two kinds—compensatory or punitive. The accidental circumstance that the innocent wrongdoer after severing the tree manufactures the timber into lumber is of no concern to the injured party. He has suffered in the same way and in the same amount whether the log

remains a log or is manufactured into the most finished of lumber products.

But let us assume that in a specific case an apparent profit has resulted to the wrongdoer. Whether that apparent profit really is profit is not to be determined by merely deducting the cost of manufacture from the market price of the finished product. In the first place, standing timber is a commodity and, given the same grade, one tree is as good as another to the lumber manufacturer. If the defendant manufacturer had not taken A's trees wrongfully though innocently, he presumably would have purchased from A, or some one else, the same or other trees and in the transmuting of these trees into lumber would have made precisely the same profit. It is not as though other trees were not available. That there is a market value for the trees wrongfully taken itself implies the existence of other available timber for the purpose. It will thus be seen, viewed from this aspect, that there really is no profit resulting to the innocent wrongdoer from converting the timber. In a word, he does not make any other or different profit from the fact that he is a wrongdoer. Therefore, he cannot be said to have profited by his wrong, which leads to the inevitable conclusion that to compel him to restore this apparent profit is in reality to mulct him in punitive damages.

Again, viewed from another aspect, the question rather is as to whether or not by reason of the transaction a greater or less gain to the wrongdoer accrued than at the time was resulting generally from similar human endeavor and investment. If the wrongdoer made more

than was currently being netted in other industries from like effort and investment, then perhaps it might be said that he profited by his own wrong, provided he could not obtain elsewhere the stumpage for his mill. If he made less—though still technically showing a profit, that is, an excess in the market value of the finished product above the cost of manufacture—he was in no sense profiting by his wrong. This condition is peculiarly and regrettably true of the lumber industry and something of which this Court may well take judicial notice—when the Federal Trade Commission is just now concluding its inquiry as to the prolonged depression in that industry. It is reasonably safe to say that at any time the same investment and activity devoted to the lumber industry would have yielded much greater profits if applied to any of our other industries. Furthermore, if the period covered by a wrongful conversion be alone looked to, and, in an isolated sense, it has been a profitable one, what of the “lean” years preceding where the investment has brought no income at all and possibly serious impairment of capital. These bad results do not manifest themselves as a bookkeeping proposition, in determining the cost of manufacture during the isolated period in question. We realize that the considerations last set forth are purely hypothetical and speculative, but we do earnestly urge that as we are all agreed that in the case of an innocent conversion the wrongdoer should not be subjected to punitive damages under any consideration, it is of greater importance that a rule should be adopted—as it has been adopted—which under no circumstances can operate to subject the innocent

wrongdoer to punitive damages, than that a principle should prevail which must in its very nature render it exceedingly uncertain whether its application has not resulted in mulcting such innocent wrongdoer in punitive damages.

It is, we respectfully submit, entering upon a speculative field of inquiry for a Court or jury to at any time undertake to determine what the profit has been in the manufacturing of an isolated lot of logs. The time-honored rule should be maintained—there is no middle ground—stumpage value in cases of innocent conversion and the value of the finished product in cases of willful conversion. These thoughts lead to the applicability of the instruction to the case at bar.

**(G) The Court's instruction as to the measure of damages in cases of innocent conversion was inapplicable to the case at bar.**

A more inopportune case than that at bar in which to attempt the introduction into the Federal Courts of this discarded Michigan *dicta* could not well be imagined. The thing seems to have been an afterthought. There was nothing in the complaint to indicate a departure from the conventional and well settled rule. It alleged (Tr. p. 4) that the value of the converted timber was

“one dollar per thousand feet, board measure, while standing; that the value of the same after being felled and prepared for sawing into lumber was five dollars per thousand feet board measure, and that the value of the same after being manufactured into lumber was ten dollars per thousand feet, board measure,”



and judgment was prayed for at the rate of ten dollars per thousand feet, board measure (Tr. p. 6).

These were appropriate allegations to meet the varying conditions the proof might develop for the application of the well recognized measure of damages in the respective cases of innocent and willful conversion. In all this there was nothing to indicate that there would be recourse to the discarded Michigan *dicta*. Had the companies or persons directly committing this alleged conversion been parties defendant, then, if the Court's instruction as an abstract proposition of law be sound, there would be no question of its applicability. In that case the defendant would have received the profits (if any) which the Court directed the jury to restore to the Government. The principle contained in the Court's instruction can obviously have no just application where an innocent agent of an innocent principal commits the wrong. The innocent agent does not receive any profit from the transaction and *as to him* the measure of damages should be the stumpage value—the tree as it stands—however it might be as to the principal. In the case of the innocent agent not participating in the profit there can be no middle ground. He is liable either as a willful trespasser or as an innocent trespasser, and if the latter he has received no profits and having received no profits he cannot be justly required to pay them over to the injured party.

In the case at bar it is not pretended that defendant participated in the profits, if any, of Fenwick or W. H. Hammond and his interest in Big Blackfoot Milling Company was about a one-fifth of its capital stock. As will

have been observed in reading Topic II above, the conversions attributable to that company, which only came into existence in November, 1891, are negligible. It results, therefore, that to apply the Court's measure of damages for an innocent conversion to one situated as was defendant is to impose punitive damages upon him and direct a recovery of profits from him which he never received.

The instruction was further inapplicable to the case as there was not a *scintilla* of evidence offered to establish the cost of manufacture or in any other way the profits, if any, derived from the conversion of the tree into the finished product. The general burden of the Government witness Hathaway's testimony was to the effect that there was no profit made at all and this is particularly true of the years during that part of the period involved in the complaint, namely, 1892, 1893 and 1894, when Big Blackfoot Milling Company was operating and which included the historic depression of 1893 and the slump preceding and following it (Tr. p. 221).

## **2. The court erroneously directed the jury to allow interest.**

Inasmuch as interest is sometimes regarded as an element of damages and at others is considered as interest, *eo nomine*, we have been in large measure compelled to anticipate a discussion of this topic in that last preceding, namely, as an element in the measure of damages applicable. In this connection we have seen that by the statute law of Montana prevailing during the period covered by the conversion interest was not

recoverable and we have argued that this Montana statute must control.

Apart from this statute, an examination of the cases cited under this topic in which the Government has sought recovery as for a conversion of timber cut upon the public domain, will disclose that in nearly all such cases interest has not be allowed—though the point may not have been discussed by the Court. The unanimity to be found in the decisions in their failure to allow interest is, we submit, so pervading as to almost compel the necessary deduction that non-allowance of interest has been crystallized as the principle applicable in the Federal Courts in this class of cases.

We submit that the rule which the United States Supreme Court has adopted does not allow interest. It is laid down flatly in the *St. Anthony Railroad case*, *supra*, that

*“the measure of damages should be the value of the timber after it was cut at the place where it was cut.”*

And the unmistakable intention of the Court to exclude interest from the computation is shown when the Court declares that:

“The judgment must be reversed and the case remanded  
\* \* \* with directions to enter judgment in favor of the United States for the amount of the timber as stated in the answer, and for its value at the rate of \$1.50 per thousand feet.”

United States v. *St. Anthony R. R. Co.*, 192 U. S. 543; 48 L. Ed. 548.

The Court would certainly have allowed interest if it had intended to announce a rule which would allow it.

*The conversion of timber in that case had taken place four years before the Court ordered judgment.*

How, then, can this Court add a rider to the rule and allow interest for a quarter of a century?

There is no excuse for a radical departure of this character here.

The most that the common law of England has ever done is to allow interest in cases of conversion, in the discretion of the jury.

“In actions for conversion the measure of damages is ordinarily the value of the goods. \* \* \*

“Interest may be allowed in addition to the value of the goods at the time of conversion *if the jury think fit.*”

Halsbury's Laws of England, Vol. 10, pp. 344, 345.

Owing, doubtless, to the fact that no statute of limitations runs against the Government, and that suit may be brought by it after a very long lapse of time—here a quarter of a century—our Supreme Court has concluded not to allow interest at all.

But if interest is ever to be allowed in such cases brought by the Government—and we submit that it is not—then, in accordance with the practice in the Federal Courts, it can be allowed only in the discretion of the jury. In other words, the Federal Courts will follow the English common law rule, not the rules laid down in state Courts, which generally are dependent upon some local statute.

A recent case to which the United States was a party, and which has a particular bearing upon the question of



interest, is *White v. United States*, 202 Fed. 501, 121 C. C. A. 33, decided February 4, 1913, by the Circuit Court of Appeals for the fifth circuit. That was an action for converting timber from public lands. It holds that there is no absolute right to interest in such cases, *also that a long, unexplained delay in instituting the action, in effect, divests the jury of discretion in the premises—in a word, that under such circumstances, it would be an improper exercise of discretion for the jury to allow interest.* The Court says (p. 502):

“The verdict and judgment show, and the parties concede, that interest was allowed by the jury from the date of conversion to the date of trial—a period of 13 years—aggregating \$2,152.50, almost one half of the entire judgment. The oral charge of the Court is set out in the bill of exceptions in its entirety, and contains no reference to the question of interest. Interest in actions of tort in the federal courts is not allowable as a matter of right; but its allowance, as part of plaintiff’s damages, is discretionary with the jury. *Eddy v. Lafayette*, 163 U. S. 456, 458; 41 L. Ed. 225.

“The jury were not instructed by the Court below that they possessed any such discretion, and probably included interest in their verdict upon the idea that the plaintiff was entitled to it as a matter of right, and not of discretion.

“It is true that plaintiffs in error do not assign error because of this omission of the Court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the Government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest.”

The United States Supreme Court also has said:

“It may be that in the absence of statute the general rule is that in actions for tort the allowance of interest

is not an absolute right; *Lincoln v. Claflin*, 7 Wall. 132; *The Scotland*, 118 U. S. 507; *District of Columbia v. Robinson*, 180 U. S. 92; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126; but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other states have done the same."

*Drumm-Flato Co. v. Edmisson*, 208 U. S. 534, 539; 52 L. Ed. 606 (a case of conversion).

"Undoubtedly the rule in cases of tort is to leave the question of interest as damages to the discretion of the jury."

*Eddy v. LaFayette*, 163 U. S. 456, 467; 41 L. Ed. 225.

"Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."

*Lincoln v. Claflin*, 7 Wall. 132, 139; 19 L. Ed. 106.

See also:

*District of Columbia v. Robinson*, 180 U. S. 92, 107; 45 L. Ed. 440.

And even in cases of the unlawful detention of money, the Government will not be allowed interest if it has been guilty of laches in prosecuting its claim.

*United States v. Sanborn*, 135 U. S. 271; 34 L. Ed. 112.

Touching this last suggestion, counsel upon the hearing of the motion for a new trial, said that in the case at bar there was no laches. But we know that all of the facts concerning the Edgar claim were investigated by Government agents as early as 1885 (see Topic II, sub-

head "*Edgar Claim*"), and that the Government brought suit to enjoin cutting on the Hellgate the same year (*supra* p. 60).

In any event as appears from the case of *U. S. v. Sanborn*, *supra*, the burden is upon the Government to account for a long delay intervening between the accrual of a cause of action and the time when suit thereon is commenced, which it is not pretended the Government has attempted to do.

In answer to the general proposition that interest is to be allowed only in the discretion of the jury, counsel appeared to be sorely pressed for authorities with which to meet those cited by us.

They quoted from *Harrison v. Perea*, 168 U. S. 311; 42 L. Ed. 478. While that opinion does speak of the "conversion of the whole assets of the estate", *the action nevertheless was not a suit at law for conversion*. It was a bill in equity for an accounting; and everyone knows that in equity interest will be allowed wherever justice may seem to require it.

Counsel also quoted a *dictum* found in *United States v. Pine River Logging Co.*, 89 Fed. 907. This is the same case which afterwards went to the United States Supreme Court and was finally determined in 186 U. S. 279, 293; 46 L. Ed. 1164, where it has already become familiar to us.

It is to be noted that the United States Supreme Court not only did not adopt the *dictum* of the trial Court as the law, but approved the rule announced by way of *dictum* in *Wooden-Ware Co. v. United States*,

106 U. S. 432; 27 L. Ed. 230, *which omits interest entirely.*

The only other case which counsel cited from the Federal Courts upon this matter of interest is *New Dunderberg Mining Co. v. Old*, 97 Fed. 150; 38 C. C. A. 89, which they declare to be "directly in point." The case was not one to which the Government was a party; it does not involve the conversion of timber, it follows the rule repeatedly declared by the Courts of the state where the conversion occurred,—in fact, it is in point neither on its facts nor on the law which it declares. This appears sufficiently from the following excerpts from the opinion (p. 153):

"The damages recovered in this case consist of the royalties which the Dunderberg Company had received from ore removed from this mine by its lessees prior to February 15, 1894, when they were enjoined from taking more, and interest on the amount of these royalties from that date. It is assigned as error that the Court instructed the jury that the defendants in error were entitled to this interest. \* \* \* It is a general and just rule that, where interest is reserved in a contract, or is implied from the nature of the promise, it is recoverable *of right*; and that when property or money has been wrongfully appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or of his funds. *In cases of the latter class its allowance is sometimes a matter of discretion*, but generally, whenever one has wrongfully detained or misappropriated the money of another, he ought to pay and must pay interest at the legal rate from the date of the misappropriation, or from the beginning of the detention."

This is very far from saying that in an action brought by the Government for the conversion of timber, interest



will be allowed as a matter of right, and not at most as a matter of discretion. Nor is it authority that in such cases interest is allowable at all.

Finally, counsel recognizing the weakness of their contention regarding interest took the position that the question of interest did not seem to have been given much consideration by any of the Courts in cases parallel to the one under review.

We submit the question has been considered sufficiently for the Courts to squarely lay down a rule which excludes it.

**3. The erroneous instruction concerning the measure of damages applicable as for an innocent conversion and the direction to the jury to allow interest was heeded by the jury and defendant was mulcted accordingly.**

The jury returned a verdict in the lump sum of \$51,040.00.

It was obviously arrived at by the following method of calculation:

They placed the stumpage value at \$1.00 per thousand feet.

16,000,000 feet at \$1.00 per thousand	\$16,000.00
They took \$1.00 per thousand feet as profit	16,000.00
They allowed interest from 1895 to 1912—17 years at 7%—equal to 119% on the stumpage value	\$19,040.00

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Making a total of	\$51,040.00
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See supra pp. 7 and 9.

**4. The objection interposed by defendant to the instruction setting forth the measure of damages applicable as for an innocent conversion and directing the jury to allow interest was sufficiently specific.**

At the outset it is to be noted that if it be the law that interest is not recoverable in a case such as this, then it was error for the Court to permit over the objection and exception of defendant, the amending of the prayer of the complaint so as to include interest (Exception No. 39, Tr. p. 746). This ruling is assigned as error (A. of E. No. 50; Tr. 831). So if the objection and exception of defendant taken to the instruction given by the Court directing the jury to allow interest is not sufficiently specific to permit a review of the instruction, nevertheless the question is properly before the Court in relation to this assignment. But the objection was sufficiently specific both as to the question of interest and the measure of damages in cases of an innocent conversion.

The charge of the Court in the particulars mentioned is set forth at length in this brief at the beginning of this topic. It will also be found (Tr. 769-70, 776). The exception taken by defendant was in the language (Tr. 780) as follows:

“Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree and I think your Honor’s instructions add to it another element.

“I also except to your Honor’s instructions with regard to interest.”

The foregoing reads as if it were a single instruction, but the fact is that it is not. The first portion appears

in the middle of a long charge (Tr. 770). It was read to the jury a considerable time (six pages of printed matter marked the interim) before the latter portion was given (Tr. 776), and when it was it came about in this way. The Court finished reading the voluminous instructions and the following took place (Tr. 776):

“The COURT. Have counsel any suggestions to make?

Mr. HALL. I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court.

The COURT. The rate of interest is the legal rate of 7%.”

If we are to treat what the Court said about interest as constituting two distinct propositions, as the trial Court itself does, then one relates to *interest* and the other to the *rate* of interest.

Our exception was in these words (Tr. 780): “I also except to your Honor’s instructions with regard to interest.”

If, therefore, the Court must depend as the trial Court would have it do, upon verbal niceties, the fact is with us that our exception strikes directly at the first proposition.

Being sufficient as to that proposition it is enough. The second proposition, if it is to be deemed a separate one, is nevertheless dependent upon the first and falls with it.

At the time this cause was argued before this Court, the opinion of the learned trial judge rendered upon the overruling of defendant’s motion for a new trial had not been published, and for the convenience of this Court we appended a copy of same to Part 1 of this brief.

Since the argument said opinion has been published in the Federal Reporter Advance Sheets, dated December 9, 1915.

U. S. v. Hammond, 226 F. 849.

We should here say that we observe some trifling differences in the language in the copy appended to Part 1 of our brief as compared with that published in the Federal Reporter, but we think there is no material change. We shall, however, hereafter refer to the opinion in its published form.

As to the measure of damages the learned trial Court points out (p. 851) that the charge covers two alternative propositions, the first applicable to a willful taking and the second should it be found that it was unintentional or innocent. It then argues that the exception interposed was not sufficiently specific, first in that there was nothing in the language of the exception that would indicate to the Court whether it referred to the first rule stated or the second, and the Court, therefore, could not know to which the objection was intended to apply. Moreover, it argues that if it be conceded the exception sufficiently indicated its application to the rule governing an innocent taking that it was wholly lacking in any intimation that it was objected to on the ground that it directed the jury to include in its verdict against defendant the difference between the expense incurred in manufacturing the lumber and the price for which it was sold—in other words, this, as the element added to the value of the stumpage in the tree, was not specified—or that the instruction was inapplicable to the facts of the case because there was no



evidence offered to show the expense of manufacture of the lumber.

It is our contention that a fair interpretation of the exception plainly shows that it was addressed to the instruction defining the measure of damages as for an innocent conversion, and unless indeed exceptions to the charge of the Court in the presence of the jury are to have the same completeness as characterize formal assignments of error (which we do not understand to be the law) that the language of the exception reasonably directed the attention of the Court to the points which on the motion for a new trial and upon this writ of error are assigned as error. The exception plainly told the Court that the allowance of any other element of damages than the stumpage in the tree was improper. We fail to see how the ground of our objection could have been made any more plain by designating the other element as the difference between the cost of manufacture and the price for which the lumber was sold. Moreover, the charge of the Court itself is not entirely clear as to whether or not in the computation of damages under the rule announced by the Court stumpage value should be first ascertained and determined and the amount so found constitute one item in the verdict; then in addition to such stumpage value that the jury should determine what, if any, profit was made in the manufacture of the logs into lumber (all of which as we have seen the jury did). On the other hand, the instruction as given by the Court might very well have contemplated the jury considering stumpage value as one of the elements of the cost of manufacture, in which event the jury would not

have found as a separate and final element what was the stumpage value and then have considered independently of that whether or not there was any profit in the manufacture, but they would have treated the stumpage value—the value of the raw material—as an element in the cost of the finished product. These two different methods of computation might produce a very different net result. Let us suppose a case, alas too frequent, where the selling price of the finished product did not equal the value of the raw material—stumpage value—plus cost of manufacture. On the argument his Honor, Judge Rudkin, had this undoubtedly in mind when he suggested that to arrive at the measure of damages by deducting the cost of manufacture from the price of the finished product might put the plaintiff in a case such as this in a position where he would not be recovering the stumpage value. If, on the other hand, the method intended to be conveyed by the Court was the allowance of stumpage value at all events against the defendant, and in addition thereto any profits that might have been made over and above the cost of manufacturing the raw material, then the peculiar situation suggested by Judge Rudkin could in no event obtain. Just what method the trial Court intended the jury to adopt is not clear to us. We quote from its opinion at page 853 as follows:

“Counsel says that the charge is erroneous because, in effect it directs the jury to deduct from the selling price of the lumber the cost of manufacture and bring in a verdict for the difference, thus giving the plaintiff the benefit of any profit upon the business of manufacturing and selling the lumber, whereas it was only entitled, if the taking was other than wilful to the value before manufacture. *If the language will bear this construction, which is not conceded.* \* \* \*”

In view, particularly of the uncertainty as to whether stumpage value should be regarded separately or as an item in the cost of the manufactured article, we respectfully submit that the only precise, safe, specific exception that in the nature of things could be made to the instruction was in just the language used by counsel for defendant, namely, that the only measure that could exist under the circumstances was the value of the stumpage in the tree and then by way of inviting elucidation from the Court if he had misinterpreted the Court's instruction counsel says: "And I think your Honor's instructions add to it another element".

The suggestion by counsel that he thought the Court had added "another element" to the stumpage value in the tree was surely sufficient to indicate to the Court that the objection was urged against the instruction specifying the measure of damages as for an innocent and not a willful conversion (and out of respect for the learned trial Court we would invite this Court's attention to the fact that the trial Court does not claim that it *in fact* was misled or not *in fact* sufficiently advised).

The fact that our exception was qualified so that we claimed that the only measure of damages that could exist "under the circumstances" was the value of the stumpage in the tree, we respectfully submit was sufficiently broad so as to cover our assignment that the instruction was inapplicable (if not erroneous as an abstract proposition of law) for the reason that there was no evidence offered showing or tending to show the cost of manufacture and furthermore that it could not rightfully apply to one situated as was the defendant,

namely, one who was only constructively liable and had not received the profits—the innocent agent of an innocent principal. If, however, we are in error as to this contention that our exception was broad enough to direct the Court's attention to the fact that we claimed the instruction was inapplicable as well as inherently erroneous, then there was no ambiguity and the Court will be held to have been sufficiently advised that we objected to the instruction in so far as it allowed the recovery of anything in excess of stumpage value. Before examining the decisions on this subject, we would suggest to the Court, as we have already noted, there was nothing in the complaint or on the trial to indicate that there would be any attempt to depart from the well settled rule as to the measure of damages for the innocent conversion of standing timber. We had supposed the rule so well settled that we did not request any instruction in the premises. The instruction came as a surprise to us and under the circumstances we submit we did all that could be reasonably expected. On the other hand, the Court had the instructions requested by each side before it for many days and presumably had given mature consideration to that which it finally gave on this subject.

Passing to the charge of the Court concerning interest and defendant's exception thereto, the Court charged as follows:

“In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time. \* \* \* The rate of interest is the legal rate of 7%.”



As noted by the learned trial Court (p. 854) that portion of the instruction following the asterisks was given by the Court upon the conclusion of its charge, and when the Court asked plaintiff's counsel if he had any suggestions to make and plaintiff's counsel suggested that the rate of interest had not been specified. Thereupon defendant's counsel specified his several objections to the charge and concerning interest he stated (Tr. 780):

"I also except to your Honor's instruction with regard to interest."

No contention is now or ever has been made by defendant that the rate of interest was improper; nevertheless, the learned trial Court (p. 854) states that the charge embraces two distinct propositions—first the right of the plaintiff to interest, and second, the rate by which it is to be estimated. It surely is not for the defendant at such a time and place to be called upon to elaborate the reasons why interest should or should not be allowed, unless the trial Court should seek information in the premises. Our contention concerning interest, as we trust this Court may have learned through the perusal of this brief, is, first of all, that interest is not allowable in this case because it was forbidden by the Montana statute at the time when the alleged conversion was committed in Montana; secondly, that in actions by the Government to recover for the conversion of timber growing on the public domain the Federal Courts have themselves worked out the principle that interest is not recoverable; thirdly, that if the Federal Courts have not thus created their own proper rule for this peculiar

class of cases, then the general rule prevailing in the Federal Courts would forbid a recovery of interest upon the ground that where so long a time has elapsed between the accrual of the cause of action and its enforcement and no sufficient or any excuse is offered for the delay in the commencement of the action, that interest is not recoverable, and finally that at best interest was only recoverable in the discretion of the jury and that the Court erred in withdrawing the question from the jury and directing the recovery of interest as of right.

The learned trial Court seems to consider (p. 854) that in some way the defendant was in fault for not having sought an instruction concerning interest, but here we would beg of this Court to recall that the complaint in this case did not ask the recovery of interest and it was only upon the close of the trial that over the objection and exception of defendant, which is here assigned as error, plaintiff amended the prayer of its complaint to include interest. Under the circumstances we respectfully submit that defendant's counsel were not required to anticipate this question of interest or inform themselves particularly as to the intricacies of the law concerning same. The learned trial Court states (p. 854) that the charge concerning interest "was framed upon the assumption by the Court that its allowance was a matter of right". Such being the case, theoretically at least, when defendant stated that it objected to the charge of the Court with regard to interest it would seem there must have been in the mind of the Court the legal proposition that as a matter of law in the Court's

understanding plaintiff was entitled to interest as a matter of right and that defendant controverted that legal proposition. Thus, on any theory of the case, it would seem that at most the defendant would be here precluded from urging the proposition that the Court should have instructed the jury to allow interest in its discretion. But we do not think this is the law and shall now examine the decisions on the subject.

The learned trial Court, to sustain its ruling, relied upon the following decisions of the United States Supreme Court:

McDermott v. Severe, 202 U. S. 600, 610; 50 L. Ed. 1162;

Mobile etc. Co. v. Jurey, 111 U. S. 584, 596; 28 L. Ed. 527.

McDermott v. Severe, *supra*, was an action by an infant plaintiff to recover damages for personal injuries. In instructing the jury the trial Court correctly stated a number of rules of damages which the jury should consider, among them an instruction permitting a recovery for pecuniary loss directly resulting from the injury, and the only objection made was a general objection to the instruction concerning damages.

In the Supreme Court it was objected that to permit a recovery for a pecuniary loss, as covered in the instructions, would allow the infant plaintiff to recover compensation for his time before as well as after he had reached his majority and that the plaintiff's father was entitled to the former. Very properly, we think, the Court held that if the defendant wished the charge

modified in that respect he should have called the attention of the Court directly to this feature and says:

“It would be very unfair to the trial Court to keep such an objection in abeyance and urge it for the first time in an appellate tribunal.”

It is readily apparent how different the situation there presented is from the case at bar. The trial Court had correctly laid down several elements of damage and, for that matter as an element of damage, measured by the pecuniary liability of the defendant in the case—to some one—even this portion of the instruction was correct. That the defendant was responsible to some one for plaintiff's loss of time, both before and after plaintiff's majority could not be controverted and the instruction correctly laid down the measure of defendant's pecuniary responsibility. In all fairness the Court's attention should have been directed to the fact that inadvertently it had failed to consider the principle that the parent was entitled to the infant plaintiff's services during his minority, and hence the parent and not the boy was entitled to recover for the boy's time during that period. Looking at the proposition in its substance the situation there presented more nearly approximates one where it might be attempted by virtue of a general exception to an instruction concerning damages to raise the question as to whether or not plaintiff had capacity to maintain the suit or that a cause of action was stated. Of course, if the plaintiff has not capacity to sue or no cause of action is stated, obviously it is error to instruct the jury to allow any damages whatsoever; yet it will be hardly contended that under



a general exception to a charge specifying the measure of damages that a party so excepting would be permitted to raise the question that no cause of action was stated or that the plaintiff did not have capacity to sue.

In *Mobile etc. Co. v. Jurey*, *supra*, the Court instructed the jury that the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at 8% per annum. There was a general exception to the charge. In the Appellate Court, by virtue of its general exception, the defeated party sought to attack the instruction so far as it specified the rate of interest as 8%, claiming that 5%, which is the legal rate in Louisiana, where the contract was to be performed, and not 8%, that of Alabama, where the contract was made, should apply.

The Supreme Court refused to reverse the judgment for this error concerning the rate of interest, inasmuch as the other portion of the instruction, namely, that the measure of damages was the value of the cotton in New Orleans, was correct and the exception to the charge was general. The Supreme Court says the exception "should have pointed out to the Court the precise part of the charge that was objected to."

It will be observed in the case last cited that no objection was made in terms as to the allowance of interest at all. In the case at bar we separately stated our objection to the Court's charge with regard to interest and also pointed out the detail wherein, in other respects, we claimed the measure of damages given by the Court was in error.

Nor do we glean anything from the cases cited from the Circuit Court of Appeals for the ninth circuit referred to in the opinion of the trial Court, which supports his ruling in the case at bar.

Montana Mining Co. v. St. Louis M. & M. Co., 147 Fed. 897, 78 C. C. A. 33, held (p. 909) that objections to instructions noted in general terms as for example, that the instruction "does not correctly state the law", or is "contrary to law", or is "not sufficiently guarded", or is "misleading", or is "inapplicable", are not sufficiently specific and direct to call the attention of the Court to the specific point claimed to be erroneous. This we understand to be the law, but we fail to see wherein it applies to the case at bar.

So in Butte & B. Consol. Min. Co. v. Montana etc. Co., 121 Fed. 524, 58 C. C. A. 634, the Court instructed the jury that the burden of proof was upon the plaintiff in error to prove every material allegation of its complaint. It further instructed the jury that if the plaintiff had failed to prove any material matter or issue the jury must find against plaintiff in error as to such issue and that if the evidence was evenly balanced as to any material matter in dispute in the case the jury must find against the plaintiff and in favor of defendant as to such matter. As a matter of fact this instruction was correct as to all the issues in the case, except the issue raised in the answer by the plea of the statute of limitations and it was contended that as to that issue the charge was erroneous and the Court should have instructed the jury that the burden of proof as to that was upon the defendant in error. The Appellate Court rightly held

that as the exception of the plaintiff in error was to the whole charge to the jury on the subject of the burden of proof, the exception was not sufficiently specific. It said (p. 528):

“No notice was thereby given to the Court of the nature of the objection which is now relied upon. If the attention of the Court had been specifically directed to the point of the objection undoubtedly the instruction would have been corrected and the jury would have been instructed as to the burden of proof upon that particular issue, if that was one of the material issues of the case.”

In the case at bar we specifically directed the trial Court's attention to the matter of interest and to the allowance of a higher measure of damages than the stumpage in the tree, and we submit that if the Court desired a more minute classification of the objection and the grounds upon which it rested it should have apprised defendant's counsel.

It is difficult to deduce a hard and fast rule concerning the particularity with which exceptions should be made. In fairness, again, to the learned trial Court it should be said that as this point was not made at all by the learned counsel for the Government, but was raised by the Court itself in denying our motion for a new trial, it resulted that it did not have our assistance, such as it is, in elucidating the question and in placing before the Court other decisions which illustrate the principles that should control in determining whether or not an exception is sufficient. It will be found that under the decisions, what might be in one instance a sufficient exception will in another be insufficient, even though the

exception might be in the same language and the particular portion of the charge excepted to also in the same language, but the scope of the action, the pleadings, the balance of the charge and the whole conduct of the trial may lead in one case to the determination that the exception was sufficient and in the other that it was insufficient.

Thus in *Edgington v. United States*, 164 U. S. 361; 41 L. Ed. 467, the trial judge gave quite a lengthy instruction as to the effect of the testimony that had been offered concerning the good character of the defendant. A reading of the charge in this respect will show that the matter of character was discussed from several aspects by the trial Court. The exception taken by defendant was in the following terms:

“We except to that part of the charge in stating the effect of good character, the defendant claiming that it should not be of force only in doubtful cases, but should be considered by the jury in connection with all of the evidence as to whether or not on all the evidence there is a reasonable doubt.”

In holding the exception sufficient the Court (p. 365) said:

“The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is the single one of the proper effect to be given by the jury to the evidence of the defendant's good character. A fair understanding of the meaning of the instruction cannot be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exceptions to sentences or phrases detached from their connection.”



In *Memphis etc. R. R. Co. v. Reeves*, 10 Wall 176; 19 L. Ed. 909, Justice Miller said:

“As to the charge given by the Court the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent or might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers as it regards the effect of loss from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning point of the case.”

In this case the Court upheld the exception, though it seems to have been a general one to the charge.

In *Felton v. Newport*, 92 Fed. 470; 34 C. C. A. 470, there was an exception to that part of the charge of the Court which stated to the jury what were the precautions prescribed by the statute which the defendant railroad company was bound to maintain for the prevention of accidents. A reading of the case shows that the statute in fact required many things of the railroad company some of which were under the facts of the case unquestioned obligations on the part of the railroad company and others of which might or might not have been according to the determination of certain collateral facts in the case, nevertheless, the Court held the exception was sufficient saying:

“The charge upon this subject was entire and bound up in a single proposition. If it was erroneous in any substantial particular, it would seem that the exception would reach the error especially where it pervades the

whole instruction given upon the subject to which the exception relates.”

In *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, Mr. Justice Lurton, afterward of the United States Supreme Court, upheld an exception, which was merely as follows:

“We desire to also except to the Court’s measure of damages in this case.”

What the Court said on this subject was this:

“If the jury should conclude that the plaintiff is entitled to recover anything, then the measure of the plaintiff’s damages would be the difference between the value of the eighty shares of stock on the 31st day of December, 1892, and its value of February 6, 1893, when the plaintiff bought it. Interest may be allowed on this, if the jury see fit. For any depreciation which may have resulted after the latter date the defendants would not be responsible, inasmuch as that depreciation may have been the result of causes with which the defendants had no connection.”

Mr. Justice Lurton held that he did not think the trial judge could have misapprehended the scope of the exception and that the charge on this subject of damages might be regarded as constituting a single subject. Citing the case of *Felton v. Newport*, *supra*.

Now it will be observed that in the charge of the Court, as quoted above, there were many facts stated therein and which it might be well argued the party excepting to the charge might have desired to attack as being mis-statements of the evidence and there are at least three distinct legal propositions involved. Again, it could just as well be argued as has been contended

by the learned trial Court in the case at bar that this charge contained two or more several subjects. The Court instructs the jury "that interest may be allowed on this if the jury see fit". It might be argued in this case that the mere taking exception "to the Court's measure of damages" might have been directed to the element of interest, or might have been directed to other features of the charge concerning the measure of damages. It might have been argued in that case that the charge in respect to interest being correct, therefore, the general exception taken to the measure of damages would not avail so as to bring in question the other portion of the charge which was unsound, but as will be noted the exception was held sufficient.

In the case at bar the learned trial Court has we respectfully submit indulged in a refinement of the rule, which is not borne out by any authority whatsoever.

In *Pritchett v. Sullivan*, 182 Fed. 480, 104 C. C. A. 624, the Circuit Court of Appeals for the Eighth Circuit had before it the sufficiency of an exception taken to the charge in an action for false imprisonment. The legal proposition involved was as to when and under what circumstances a police officer might lawfully make an arrest without having a warrant and the charge was quite lengthy in respect thereto (p. 482).

The language of the exception and the Court's ruling as to its sufficiency is as follows (p. 483):

"It is contended that no sufficient exception was taken to the charge. At the conclusion of the charge, counsel said:

“ ‘Defendants except to all that part of the instruction concerning the right of police officers to arrest without a warrant.’

“The Court said:

“ ‘Do you contend that I have transgressed the law in that respect?’

“And counsel replied:

“ ‘Didn’t give the law as I understand it.’

“We think the exception sufficient. The Court had repeatedly declared that there could be no lawful arrest without a warrant except upon view of the commission of the offense. The exception was directed to that particular part of the charge, and it was as definite and precise as if counsel had excerpted the exact language of the Court and appended an exception to it. The inquiry made of counsel did not call for his view of the law further than already indicated, nor an explanation of the reasons for his exception. Perhaps counsel should have been more explicit if the Court had acted inadvertently or its language had been unhappily chosen to express a correct view of the law.”

The same Appellate Court in the case of *Humes v. United States*, 182 Fed. 485, 105 C. C. A. 158, where the defendant in the trial Court had put in evidence his good character for truth, varacity and honesty, the Court had charged in respect thereto, and defendant’s counsel had taken the following exception:

“I also desire to save an exception to the charge of the Court given as to the effect of the defendant’s good character.”

The appellate Court said:

“Counsel for the government contends that the exception was not sufficiently specific. All that was said by the learned trial judge on the subject of “reputation” or “character”, which appear to have been used interchangeably, occupied a very little space and consisted practically of but one legal proposition, namely, that the



possession of a good reputation by a person charged with crime "only accentuates the measure of his responsibility" and enables him the better to impose upon others. This expression of view is so strikingly out of harmony with the accepted law governing the value of personal character in criminal trials that an exception in general terms like those employed could not have been misunderstood by the trial judge. It pointed unerringly to the vice complained of. Under authority of the case of *E. J. Pritchett et al. v. Samuel Sullivan* (C. C. A.), 182 Fed. 480, just cited, and cases therein cited, the exception as taken was sufficient."

See also

*Horn v. United States*, 182 Fed. 721, 742, 105 C. C. A. 163.

*Southern Pacific Company v. Arnett*, 126 Fed. 75; 61 C. C. A. 131, illustrates well the fair working of the principle. On the theory that this action against the railroad company was one in tort rather than in contract, it was error on the part of the Court to direct the jury to allow interest, instead of leaving it in the discretion of the jury. Concerning this the Court (p. 80) says:

"The entire charge of the Court concerning the measure of damages is contained in a single paragraph, and the only complaint of it before the jury retired was a general exception 'as to the measure of damages'. No exception was taken to the allowance of interest, nor was the attention of the Court in any way called to the question of law relating to it. Counsel for defendant by their silence waived any objection to the charge upon this ground, and the error in this respect is not here for our consideration." (Citing cases.)

But in the case at bar we singled out and specified our objection to the charge allowing interest as well as

the Court's measure of damages for an innocent conversion.

In conclusion we submit the exceptions to the charge concerning interest and the measure of damages as for an innocent conversion were up to the standard required by the most technical. However, if not sufficient, to use the language of Mr. Justice Miller, *supra*, is there "any reason to suppose they (the errors in the charge) were inadvertent or might have been corrected if specified by counsel at the time".

The opinion of the learned trial Court rendered upon the motion for a new trial after deliberation and much argument, approves of the charge as given by it, at least as to the measure of damages—and approves of it not only as an abstract proposition of law but as well in its applicability to the case at bar. It is apparent that the instruction would have been given just as it was given no matter how elaborate had been the defendant's exception.

The opinion does not make it so clear what the Court would have done had it had before it the rule sometimes prevailing that interest may be recovered in the discretion of the jury. The Court now tells us it assumed that interest was allowable in such a case as a matter of right. As a matter of fact we assumed, and we still contend it to be the law so argued upon the motion for a new trial, that interest was not recoverable at all—not even in the discretion of the jury. As has been noted it was only on the close of the trial that the plaintiff amended the prayer of its complaint, over our objection, so as to seek the recovery of interest.

Naturally, under the circumstances, we had not given the matter much thought, nor had we asked for any instruction on the subject. When the Court did instruct the jury to allow interest, at that time it was neither our obligation nor our right to propose instructions on the subject. We objected to the instruction as it was given. We did not have to object to instructions that were not given. If an instruction to the jury to allow interest in their discretion had been given we would, of course, have objected to that. Even had we thought of it, it would have been quixotic to suggest to the Court that interest was recoverable in the discretion of the jury only to deny the validity of the suggestion by taking an exception to the principle when incorporated in the charge. An objection to an instruction as given is sufficient without framing a counter-instruction that is satisfactory. It was enough for us to say that the charge allowing the recovery of interest was wrong without further saying to the Court and if you change it so as to make the recovery of interest discretionary with the jury we shall except to that also. Sufficient for the day is the evil thereof. Is defendant to be mulcted in the sum of \$19,040.00, because his counsel failed to object to an instruction which the Court omitted to give and which plaintiff did not ask for?

As noted, page 11 *supra*, precedent is not wanting for the striking out of such an interest item and that too where no instruction whatsoever on the subject of interest was given, where none had been asked, and where the awarding of interest was not assigned as

error, nor even the point raised by counsel in the Appellate Court. So in the case at bar we respectfully submit there is no necessity for sacrificing justice on the altar of technicality.

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## TOPIC V.

**THE COURT ERRED IN INSTRUCTING THE JURY THAT IF THE MANNER OF THE TAKING OF THE TIMBER WAS SUCH AS TO ENHANCE PLAINTIFF'S DIFFICULTY IN ESTABLISHING THE EXACT EXTENT OF THE DAMAGE THE PROOF NEED NOT BE OF THAT PRECISE EXACTITUDE WHICH WOULD BE REQUIRED UNDER OTHER CIRCUMSTANCES AND IN FAILING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT THAT IT WAS INCUMBENT UPON PLAINTIFF TO SHOW BY A PREPONDERANCE OF THE EVIDENCE BY WHOM THE TIMBER WAS TAKEN AND THE QUANTITY THEREOF.**

Assignment of Error, No. 7, page 22 *supra*, sets forth the charge of the Court (Tr. 767-9) in this particular which is as follows:

“If the jury find that the timber sued for or any portion thereof was taken and converted by the defendant and his associates as alleged, then it will be necessary to determine the quantity and value of that so taken in order to fix the amount of your verdict. In a case such as that disclosed by the evidence this is an inquiry of some difficulty. The transactions involved not only date far back in time but cover a series of years, and that alone would tend to render proof more difficult than if those transactions were more recent. But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, then the law authorizes you to indulge every fair and reason-



able inference justified by the circumstances in fixing the amount which the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he had made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are wholly unable to determine it, then, even though you find the defendant responsible, the plaintiff cannot recover beyond nominal damages."

It is, we submit, harsh enough on the citizen after some twenty-five years have elapsed since an alleged conversion for which he is at best only constructively liable that he should be haled into Court some thousand miles, or more, from the scene of such conversion to answer therefor, without having that lapse of time made an excuse for less precision or certainty in the proof to be offered by his sovereign than is ordinarily required. Not content with this, the instruction goes on to point to the jury a way in which they can circumvent this obvious and practical requirement of certainty.

"If you find that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered".

There is only one way that we are advised of in which a tree can be cut and that is by cutting it. The manner of the taking would seem as an abstract proposition of logging to be universally the same and certainly there was nothing in the evidence to show that any bizarre methods were adopted in the case at bar. Is defendant to be made the target for the guesses of the jury as to the amount of timber taken, because, forsooth, after a quarter of a century some of the stumps have rotted or been burned in whole or in part? At best the whole proposition of estimating from stumps the merchantable timber that may have been taken therefrom is guess work to a great extent.

But if the timber had been taken in the unique manner (whatever it is) that the Court had in mind then the jury are told that they are authorized to "indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered". How lucid!—What kind of inference and what are the circumstances which justify it? We do not know. Meaningless jargon as it is we think the net result was to invite the jury to disregard such a mere detail as precision—not to let that stand in the way—and to soak the defendant if they felt like it.

Had the plaintiff in this action been other than the sovereign, the action would have been barred many times over by the statute of limitations. The fact that this favored plaintiff is immune from the statute of limitations and finds itself confronted at the trial with establishing a set of facts, proof of which may have been rendered difficult by the lapse of time, does not

mean that the burden of establishing such proof is in any way lightened.

In *U. S. v. Stinson*, 197 U. S. 200; 49 L. Ed. 724, speaking of a suit by the Government to set aside a grant of land, the Court said:

“The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. ‘It should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction shall make such an attempt successful.’ ”

In the case of *Chesapeake & Delaware Canal Co. v. U. S.*, decided by the Circuit Court of Appeals for the Third Circuit, June 7, 1915, 223 Fed. 926, it was held, reversing the trial Court, that while a plea of the statute of limitations would not lie in an action brought by the United States, nevertheless that like any other individual party plaintiff the presumption of payment would be applied where it appeared that more than twenty years had elapsed since the indebtedness accrued.

In reaching this conclusion the Court said:

“In Courts of justice, facts must be proved in the same manner and by the same means, no matter who the litigants may be. The Government is not privileged merely to lay its claim before such a tribunal and demand allowance forthwith. Speaking generally, it must offer the same evidence as an individual, both in quantity and quality, and if it offers none, or if the evidence be insufficient it fails precisely as the individual fails in similar circumstances. The property of a citizen can only be taken according to the rules and forms of law, and even

if it be the sovereign who is striving to take it by an action in Court, we think the sovereign also should be required to prove his right, and to prove it with the same strictness and according to the same rules as prevail in other cases”.

And the Court quoted from the case of

Mountain Copper Co. v. U. S. (C. C. A. 9th Circuit), 142 Fed. 629; 73 C. C. A. 625,

wherein it is said:

“It is the well established law that, when the Government comes into Court asserting a property right it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less.”

We respectfully submit that the error in giving this instruction demands of itself and regardless of other errors that the case be reversed and a new trial ordered.

In this same connection we also contend that the Court erred in failing to give defendant's proposed instruction, covering this subject—A. of E. No. 8, supra 30.

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## TOPIC VI.

**THE COURT ERRED IN INSTRUCTING THE JURY THAT THE CIRCUMSTANCES WERE SUCH AS TO THE TIMBER TAKEN FROM THE EDGAR CLAIM, THAT THE TAKING OF SUCH TIMBER COULD NOT BE REGARDED AS AN INNOCENT TRESPASS CALLING FOR THE APPLICATION OF THE MORE LENIENT MEASURE OF DAMAGES.**

The Court instructed the jury as follows:

“The defendant seeks also to justify the cutting and removing of the timber from the S. E.  $\frac{1}{4}$  of Section 28, Township 14 North, Range 14 West, by reason of the



fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a willful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him, acting under his direction and control, cut and converted the timber in question from the S. E.  $\frac{1}{4}$  of said Section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold.”

A. of E. No. 5, supra 18.

This instruction was erroneous in that it told the jury that Edgar was necessarily a willful trespasser and that Edgar, and the defendant for that matter, would, therefore, be subject to the higher measure of damages consequent therefrom. If Edgar mistakenly believed he had the right to cut timber from his claim, which he might very well have believed in view of the making of his final proof and the payment of his four hundred dollars, neither he, nor those purchasing from him, if they likewise were innocent, would be chargeable on any other basis than as for an innocent trespass. Whether this was Edgar's belief and those purchasing

from him, should have been left for the jury to determine, which was not done.

Under Topic II above, the facts concerning the Edgar claim, are marshalled under the sub-head of "Edgar claim", and need not now be further considered. The facts are such as to bring the case well within the rule recently announced by the Circuit Court of Appeals for the Eighth Circuit in the case of

H. D. Williams Cooperage Co. v. U. S. 221 Fed.  
234.

Holding that one situated as was Edgar is not necessarily a willful trespasser and that it should be left to the jury to determine whether he was guilty of an innocent or willful trespass.

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## TOPIC VII.

**THE COURT ERRED IN INSTRUCTING THE JURY THAT IN ORDER TO JUSTIFY THE TAKING OF TIMBER FROM THE HELL GATE LANDS THAT, AMONG OTHER THINGS, THEY MUST FIND THE LAND FROM WHICH SAID TIMBER WAS TAKEN TO HAVE BEEN MORE VALUABLE FOR THE MINERAL THEREIN THAN THE TIMBER GROWING THEREON.**

We submit that the decision in the case of U. S. v. Plowman, 216 U. S. 372; 54 L. Ed. 523, did enough to limit the territory to which the Act of June 3, 1878, might be applicable without requiring that lands be subjected to the comparative test of value for the timber growing thereon or the mineral contained therein. This portion of the instruction is assigned as error (A. of E. No. 4, Subdivision C).

We submit that for the purposes of this Act it should be enough that the character of the lands was such that a person of ordinary prudence would be justified in the expenditure of his labor and means, with a reasonable prospect of success, in developing a mine which might become valuable as the country settled up.

We are not asking this Court to overrule the Supreme Court of the United States, but we do submit that the trifling benefit left in the Act by Mr. Justice Holmes' decision should not be further frittered away.

The Court we are addressing has already through its decisions shown its appreciation of the conditions in the western states with reference to the necessities which led to the enactment of the Mineral Land Act of June 3, 1878. On the same day as the Act last mentioned was passed the Timber and Stone Act was also enacted. The so-called Timber and Stone Act of June 3, 1878, Ch. 151, 20 Stat. L. 89, as originally enacted, was limited in its operation to the States of California, Oregon, Nevada and Washington Territory. The Act of August 4, 1892, Ch. 375, Sec. 2; 27 Stat. L. 348, extended the Timber and Stone Act to all "public land states". Nor was it, as we have seen, under Topic II herein, until 1891, that the Acts of March 3, 1891, were enacted, which conferred the power upon the Secretary of the Interior to issue permits for the cutting of timber on the public domain. It will thus be seen that so far as Montana and the public land states were concerned other than California, Oregon, Nevada and Washington Territory, the Mineral Land Act of June 3, 1878, furnished the only means by which the settlers could obtain timber

for mining, manufacturing, agricultural or domestic uses, save, as under the Homestead Law, land with timber growing therein and might be taken up for farm and residence purposes.

For a time it was questioned whether or not the Mineral Land Act of June 3, 1878, by reason of the inclusion of the phrase "other mineral districts of the United States" therein, did not apply to mineral districts outside of the enumerated states. The Land Department so held consistently, but finally succumbed to the repeated rulings of the Federal Courts to the contrary.

38 Land Dept., Dec. 75.

We, therefore, take the position that in order to effectuate the obvious intention of Congress to give substantial relief to Montana and other districts similarly situated, the test in determining whether lands were of a character sufficiently mineral to come within the terms of the Act is not whether they were more valuable for the timber growing thereon than the mineral contained therein, but merely whether the prospect of developing a mine or other mineral deposit—such as coal lands, etc.—was such as to warrant a prudent person in expending money for that purpose.

Chrisman v. Miller, 197 U. S. 313; 49 L. Ed. 770;

Steele v. Tanana Mines R. Co., 148 Fed. 678; 78 C. C. A. 412.

In the practical application of the Act of June 3, 1878, no comparative tests are necessary. The Act did



not purport to give, nor did it give any exclusive right to the person cutting timber thereon as against a settler, locator of a mining claim, or purchaser under the Timber and Stone Act or even as against another person cutting timber thereon. It is only where contests arise between persons claiming antagonistically and exclusively that a comparative test need be resorted to.

The operation of the Timber and Stone Act by analogy furnishes an illustration, though there in order for that Act to apply the land had to be either "valuable chiefly for timber" or "valuable chiefly for stone", as the case might be, and so it was held that lands were "chiefly valuable for stone" and subject to entry under said Act regardless of whether or not the stone could, under existing conditions, considering the cost of quarrying and transportation, be marketed at a profit.

34 Land Dept., Dec. 123.

In thus ruling the Department held that to adopt any other construction of the Act would make it read as though Congress had said "lands commercially valuable, chiefly for stone" and the Department well points out that it not infrequently happens in farming that when the farmer has raised his crop he does not sell it for enough to pay the cost of production and transportation, but nevertheless it does not follow that the lands are not valuable for agricultural purposes. Surely by the Mineral Act of June 3, 1878, Congress at least intended that the inhabitants of the State of Montana might cut timber for the purposes mentioned in the Act from lands which in the then undeveloped state of the West might not entice, as a business proposition,

the investment of money in exploitation of such lands for the mineral therein and which for that reason were at the moment more valuable for the timber growing thereon than the mineral contained therein.

See also

U. S. v. Budd, 144 U. S. 154, 167; 36 L. Ed. 384;  
Thayer v. Spratt, 189 U. S. 346; 47 L. Ed. 845.

## TOPIC VIII.

### ERRORS COMMITTED BY THE COURT IN THE RECEPTION AND REJECTION OF CERTAIN EVIDENCE.

1. **The Court erred in refusing to permit the witness, W. H. Hammond, to testify as to the terms of the lease under which he rented the Bonner Mill from Blackfoot Milling & Manufacturing Company.**

Concerning the history of the Bonner Mill, we have seen (*supra* pp. 80 et seq.) that W. H. Hammond was sole owner of it until February, 1888, when Blackfoot Milling & Manufacturing Company was incorporated to take it over. W. H. Hammond became a stockholder to the extent of about one-fourth in the new company and as part of the consideration for the transfer of the mill property to the company it was agreed that he should have a lease on the mill for two years, with the privilege of three, and such lease was actually entered into (Tr. pp. 434-5).

For the purpose of substantiating the *bona fides* of this transaction defendant offered in evidence the lease dated, Feb. 10, 1888, from Blackfoot Milling & Manu-

facturing Company to W. H. Hammond, which the witness, W. H. Hammond, identified as the lease to which he had referred in his testimony (Tr. 435-6). The Court sustained the objection of plaintiff to the admissibility in evidence of said document on the ground that its execution was not sufficiently proved, it having no corporate seal and not being acknowledged. Defendant thereupon offered the document in evidence as the document or fact that caused W. H. Hammond to take possession of the mill property, but it was denied admission on that theory, to which ruling defendant excepted.

Defts. Excp. No. 4; A. of E. No. 29; Tr. p. 436.

Thereupon witness, W. H. Hammond was asked by defendant to state from his recollection what the terms of the instrument were of which he had a duplicate copy, his copy having been lost in the fire of 1906. Defendant contended that the question was proper (Tr. 437-8); that the existence of the document went to the question of the good faith of witness in everything he did and in so far as the acts of the witness were imputable to any party to this action, that it was a proper subject of inquiry, but the Court sustained plaintiff's objection.

Defts. Excp. No. 5; A. of E. No. 30; Tr. p. 438.

Witness, W. H. Hammond, was then asked by defendant how much rental he paid when he was operating under the lease, as to which he had testified; but the Court sustained plaintiff's objection thereto.

Defts. Excp. No. 6; A. of E. No. 31; Tr. pp. 438-40.

Defendant then asked witness, W. H. Hammond, to whom did he pay rental—witness testifying that he paid rental—but the objection of plaintiff was sustained thereto.

Defts. Excp. No. 7; A. of E. No. 32; Tr. p. 439.

Defendant then asked witness, W. H. Hammond, whether there was any provision of any kind for the extension of the original lease, but the objection of plaintiff was sustained thereto.

Defts. Excp. No. 8; A. of E. No. 33; Tr. p. 439.

Defendant then asked witness, W. H. Hammond, if he ever operated the property under what purported to be an extension of the lease, but the objection of plaintiff thereto was sustained.

Defts. Excp. No. 9; A. of E. No. 34; Tr. pp. 439-40.

We contend that irregularity in the execution of the lease should not have prevented its admission in evidence as the document or fact under which the witness, W. H. Hammond, held possession of the premises, and that witness, W. H. Hammond, should have been allowed to testify as to its terms. Why should he not have been allowed to testify as to the amount of rental he paid and to whom he paid it? This line of testimony was offered to establish the *bona fides* of the interest of W. H. Hammond as lessee and of Blackfoot Milling & Manufacturing Company as owner and lessor; also as bearing on the relationship of defendant to the property. It tended strongly to negative the theory of plaintiff (*supra* p. 51), that the several corporations and individuals were designed merely to furnish a



cloak for the operations of defendant. The testimony was relevant for this purpose and we submit prejudicial error resulted from its exclusion.

2. The Court erred in denying the admission in evidence of two affidavits made by miners concerning the mineral character of the Hellgate lands in connection with the testimony of G. W. Fenwick, who testified that these affidavits among other things furnished the basis for his bona fide belief that the lands were mineral.

The question whether or not G. W. Fenwick in good faith believed the Hellgate country, over which he was about to cut, to be mineral lands was, of course, one of the issues in the case. He testified (Tr. 557-60), that before he purchased the Bonita Mill he had seen several affidavits regarding the mineral character of that section of the country and that these affidavits among other things constituted the basis of his belief that the land was mineral land. He testified that he could identify two certain affidavits, one made by H. A. Ameraux and the other by William H. Smith, as having been seen by him (the witness), and thereupon defendant offered said affidavits in evidence, but the Court sustained the objection of plaintiff thereto upon the ground that the affidavits were and each of them was an ex parte statement by which plaintiff could not be bound.

Defts. Exep. No. 13; A. of E. No. 36; Tr. p. 562.

The affidavits are set forth in Tr. pp. 560-2 and the territory described therein, namely, the country lying along the line of the Northern Pacific Railroad from Missoula to the Town of Bearmouth, embraced the cut-

ting done by Fenwick. We submit the fact that these affidavits were ex parte statements is of no consequence here. So long as the witness, Fenwick, had testified they constituted one of the elements which induced him to believe the lands he was about to cut on were mineral lands within the then understood meaning of the Act of June 3, 1878, and so long as such affidavits might reasonably tend to induce such belief (which cannot well be gainsaid) we contend they were admissible in evidence in support of the bona fides of Fenwick's expressed belief, and that it was prejudicial error to deny the admission of these affidavits in evidence.

**3. The Court erred in requiring defendant to testify concerning the extent of his wealth and more particularly as to what his holdings in Missoula Mercantile Company were worth in the year 1906.**

Defendant, while on the stand as a witness in his own behalf was, on cross-examination, required by the Court to answer a series of questions which we think were permitted wholly without justification in law and certainly were highly prejudicial. While on cross-examination defendant testified that he was indirectly still a stockholder in Missoula Mercantile Company, that is to say, that he owns stock in a company that owns stock in Missoula Mercantile Company, but that he "continued personally to own stock directly in Missoula Mercantile Company until (I think) three or four years ago" (Tr. p. 706). A description of Missoula Mercantile Company and defendant's relation thereto will be found at page 88, *supra*.

He was asked the following question:

“Q. How much did you ultimately realize from the sale of your interest in Blackfoot Milling & Manufacturing Company; Big Blackfoot Milling Company; the Montana Improvement Company and the Missoula Mercantile Company?” (Tr. 706-7).

To this question defendant objected on the ground that it was irrelevant, incompetent and immaterial and not cross-examination; that it was furthermore an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution. The Court overruled defendant's objection.

Defts. Excp. No. 16; A. of E. No. 39; Tr. p. 707.

The witness answered this question as to Montana Improvement Company and Blackfoot Milling & Manufacturing Company.

Defendant was then asked how much he ultimately received out of the sale of Big Blackfoot Milling Company. The same objection was interposed and the defendant was required to answer.

Defts. Excp. No. 17; A. of E. No. 40; Tr. p. 708.

Finally, defendant was compelled to testify that his stock in Missoula Mercantile Company was worth at least \$250,000.00, or \$300,000.00, at the time he exchanged it for stock in the holding corporation, which acquired the stock of Missoula Mercantile Company—and this, be it remembered, was at a time only three or four years prior to the time at which defendant was testifying, that is to say, as of the year 1906 or 1907.

In other words, defendant was not only required to testify as to what his holdings in Missoula Mercantile Company were worth (which was in itself most objectionable) but what they were worth some twelve or thirteen years after the close of the period covering the conversions alleged in the complaint.

Defts. Excp. No. 18; A. of E. No. 41; Tr. p. 708;

Defts. Excp. No. 19; A. of E. No. 42; Tr. p. 709;

Defts. Excp. No. 20; A. of E. No. 43; Tr. p. 710.

We submit that this inquiry was grossly unfair and prejudicial. It is not often that the financial status of a defendant becomes a relevant question. There was nothing here to make it so. No one can question the highly prejudicial character of the testimony. Not only was defendant thereby subjected to the odium attaching to a malefactor of apparent wealth, but more specifically, bearing the seal of the Court's approval as to its relevancy, this testimony plainly suggested to the jury that defendant having prospered and still prospering in his activities in Montana could well afford to make restitution to the Government for any conversions committed by those with whom he was more or less associated in business and with whom Missoula Mercantile Company presumably had profitable dealings.

**4. The Court erred in admitting in evidence part of the duplicate assessment books of the County of Missoula relating to the assessment of Missoula Mercantile Company.**

Over the objection of defendant plaintiff offered in evidence part of the duplicate assessment books of the



County of Missoula relating to the assessment of Missoula Mercantile Company during the years 1890 to 1895 inclusive.

Defts. Exception No.	A. of E. No.	Trans. p.
01-A	51	404
01-B	52	405
01-C	53	406
01-D	54	406
01-E	55	407
01-F	56	408
01-G	57	408

The admissibility in evidence of these tax assessments was objected to upon the ground that the same were, and each of them was, incompetent, irrelevant and immaterial, hearsay, and *res inter alios acta*.

The facts concerning the making up of the tax assessments are set forth at length supra pages 110-113 and we submit the point made above without further argument. If as we there contend the force, if any, of this evidence was neutralized through the introduction by defendant of other evidence in relation thereto, we cannot reasonably contend that the erroneous admission of this evidence was prejudicial, but, should the Court not regard our evidence as accomplishing this, then we insist on our objection to the inadmissibility of these tax assessments.

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## TOPIC IX.

### THE COURT ERRED IN OVERRULING THE AMENDED DEMURRER TO THE COMPLAINT.

An amended demurrer (Tr. p. 17) was interposed to the complaint, which demurrer was overruled and the

action of the Court in so doing is assigned as error (A. of E. No. 1).

A general outline of the complaint is set forth pages 1 to 4, *supra*.

**1. The complaint stated no cause of action against defendant.**

It is alleged in paragraph 3 of the complaint (Tr. p. 2) "that defendant entered upon the aforesaid lands and cut down, felled and removed and caused to be cut down, felled and removed, timber that had been standing and growing upon said lands and manufactured and caused to be manufactured the same into lumber. That said defendant in committing the acts in this paragraph last mentioned acted as the general manager in charge of and directing all the business of" two certain corporations.

It is further alleged in paragraph 9 (Tr. p. 5) that the timber was manufactured into lumber by defendant at mills operated and owned by the said corporations and conducted and managed by the said defendant, "the cutting having occurred under the immediate direction and control of defendant" and the lumber "having been manufactured under the direction and control of defendant". As will be observed the allegations as to defendant's relation to the cutting and manufacturing of the lumber in question are not direct—are mere participial pleading—and must be disregarded.

Paraphrased, this means that the cutting and manufacturing was done by two certain corporations and that defendant, acting as the general manager of and directing all of the business of these corporations, di-

rected and controlled the business of these corporations.

It is to be observed that there is no allegation that defendant personally participated in the cutting and manufacturing of the lumber and all the allegations, direct and indirect, amount to no more than that defendant was an agent of these two corporations—an agent, if you like, with as extensive powers as the fundamental nature of corporate organization and Government permits—but still an agent and not a principal.

Defendant's relation to these corporations and the act or acts of conversion is also made the subject of special demurrer *par.* 52-60 (Tr. p. 56).

What then, is the liability of an agent for the tort of his principal? That has been considered in Topic II, *supra*.

In the case at bar it cannot be pretended that the complaint charges defendant with personally participating in the physical acts of cutting the timber and manufacturing it into lumber; there are no sufficient allegations that defendant personally directed such cutting and manufacturing or either of them; the recital or participial allegation about the cutting of the lumber "having occurred" and the lumber "having been manufactured" under the direction and control of defendant, if it can be considered at all by reason of its form and lack of directness, is no more than a definition of the scope of defendant's employment—in other words, that defendant's employment was such that this cutting and manufacturing would have been under his direction and

control. It is not the equivalent of the allegation that defendant personally participated in the cutting and manufacturing of the lumber; nor is it the equivalent of an allegation that defendant affirmatively directed the cutting and manufacturing of the lumber.

**2. The complaint lacks the essential requirement of certainty.**

As has been noted in our general review of the complaint at pages 1-4 *supra*, two distinct bodies of land were involved and of this, of course, the trial Court could take judicial knowledge when the amended demurrer to the complaint was heard, but the complaint leaves us in the dark as to when during a period of ten years ending January 1, 1895, the timber alleged to have been cut and manufactured was in fact cut and manufactured; or from which body of land or from which of the several sections comprising each, or the Governmental subdivisions thereof into forty acre tracts, the timber was taken.

The complaint in nowise attempts in any way to charge any part of the conversion or trespass specifically to either company or the defendant in connection therewith, and the plaintiff admits that it cannot state what cutting and what manufacturing of lumber from the timber cut occurred in particular months or in particular years or what appropriation of its timber or its lumber occurred in particular months or in particular years. It is alleged, however, that the estimate of the timber and lumber taken from the lands is ascertained and stated in the complaint from actual stumpage measurement on the ground, par. 9 (Tr. p. 5).



It is alleged, par. 10 (Tr. p. 6), that the trespasses and wrongful acts of the defendant alleged to have been committed by him were continuing in their nature and constituted and were in pursuance of a plan on the part of said defendant and the said corporations to cut and appropriate and manufacture into lumber the timber cut from plaintiff's lands.

We respectfully submit that certainty in the time, place and amount of the conversion or conversions and as to the particular corporation guilty thereof is required in the details pointed out in our demurrer, and that in their absence the special grounds of demurrer as well as the general demurrer for want of facts should be sustained.

The code has not changed this common law requirement of certainty. It was said in *Siegel-Campion Co. v. Holly*, 44 Colo. 580; 101 Pac. 68:

“While the Code abolishes the distinction between different forms of action, the complaint for a conversion of property under the Code must now contain all the material allegations which were necessary in an action of trover at Common Law.”

In a case arising out of the Mutual Life Insurance Company scandals the appellate division of the Supreme Court of the State of New York reversed the decision of the trial Court, which denied a motion to make the complaint more definite and certain—the latter procedure being improper under our practice and such defects being reached by demurrer for ambiguity, uncertainty and unintelligibility.

### The Court said:

“In the second count the plaintiff alleges its incorporation and that ‘between the 1st day of January, 1893, and the 17th day of November, 1905, the defendants, acting jointly, wrongfully and without authority, took certain money, the property of the plaintiff, consisting of checks, bank bills, United States notes, treasury notes, gold and silver coin, of the amount and value of \$500,000, and converted the same to their own use to the damage of plaintiff’ in the sum of \$500,000. I am of opinion that this count should be made more definite and certain. It is possible that the conversion of this property constituted only a single transaction but that is highly improbable. It is not alleged to have been converted all on the same date, but during a period covering nearly thirteen years. Various kinds of property is involved and the amount is very large. The reasonable inference is that this wrong was not a single act of conversion but many acts at different times, quite remote and disconnected one from another. The count should be further made more definite and certain with respect to the time, and with respect to whether it is claimed that the property was converted by a single act or transaction, and, if there was more than one conversion, the causes of action should be separately stated and numbered.”

Mutual Life Ins. Co. v. Raymond, 103 N. Y. Supp. 839.

As to the uncertainty, unintelligibility and ambiguity in the complaint, which is attacked by the amended demurrer from every point of view, we briefly direct the Court’s attention to the following specifications in the amended demurrer (Tr. p. 17).

That it does not appear between what time or times within the ten (10) year period named in the complaint, the timber or any thereof was felled (5, 6, 7), or was manufactured and sold (8), or was appropriated

by defendant, used, or sold (9, 10, 11), nor how much of the timber and lumber alleged to have been converted was converted by each company (12, 13, 14), nor whether by "The Montana Improvement Company, Limited," from all or only certain of the lands described in the complaint (15, 16, 17), or in other words, from which of the described lands was the timber taken by this company (18, 19, 20); so, as to "The Blackfoot Milling and Manufacturing Company," was timber taken by it from all the lands described in the complaint or only from certain of said lands (21, 22, 23), or, in other words, from which of the lands described in the complaint was timber taken by this company (24, 25, 26)?

As bearing upon the locality from which the timber was taken, irrespective of the person felling it, we point out that it does not appear how much was taken from the water shed of the Big Blackfoot River or how much was taken from the water shed of the Hell Gate River (27, 28, 29)—territories that are geographically, topographically, geologically and commercially distinct and separate the one from the other. And the same uncertainty is assigned in terms of the governmental subdivision of lands (30, 31, 32). These last grounds of demurrer may be eliminated from consideration if the next two grounds of demurrer are sustained by the Court. We contend that the Government should have been required to state in its complaint the amount of timber it claims has been cut off each quarter of every quarter section of land described in the complaint. As the Court knows, judicially and otherwise, such forty

acre tract is the smallest sized subdivision of which entry may be made under the Homestead and other settlement laws. In a word, it is the unit of measurement.

We submit our demand that the Government state just how much timber they claim was cut off each quarter section *and when* was entirely reasonable and was necessary in fairness to the defendant to enable the preparation of his defense. It is to be remembered that the complaint admits that actual stumpage measurement had been made on the ground. In this particular at least, the Government's ignorance could not excuse it. Having these thoughts in mind we, therefore, took objection to the complaint in that it does not state the amount of timber which the Government claims to have been cut on each quarter section—160 acres—(33, 34, 35), though we submit we are entitled to know the amount claimed to have been cut off each quarter—forty acres—of each quarter section embraced in the land described in said complaint (36, 37, 38).

The demurrer points out as a defect, that it cannot be ascertained from the complaint whether one or several acts of conversion are complained of (39, 40, 41), and the place or places of such acts of conversion (42, 43, 44), or where the mills were situated where the lumber was manufactured (45, 46, 47), or as of what place the value of the manufactured lumber is computed (48, 49).

As a matter of common fairness plaintiff in this case, by reason of the great lapse of time since the commis-



sion of the conversions complained of and of the further fact that defendant was at best only constructively liable for the acts of others, should voluntarily have given all available details as to the time, place, manner and amount of each conversion, and failing in this, the trial Court should have compelled plaintiff to do so by sustaining our demurrer. As it was, defendant was put to many hundreds of dollars extra expense in investigation and in the taking of testimony by reason of the vagueness of the charges made and indeed, it may be doubted whether this lack of precision in the complaint did not finally result in the interposition of a defense less perfect than would have been possible had the complaint contained the detail which we contend the law requires. It will be noted that while plaintiff took many depositions in Montana it never disclosed the amounts claimed to have been taken from the several sections of land until the time of the trial, and efforts on the part of defendant, outside the courtroom, to obtain from plaintiff this information, which the complaint alleged the Government had in its possession at the time the complaint was filed, were wholly unavailing.

Plaintiff sought to get away from the ordinary requirement of certainty as to the time, place, amount of each conversion during this period—in other words, from the principle laid down in *Mutual Life Insurance Company v. Raymond*, 103 N. Y. Supp. 839, *supra*—by the simple expedient of alleging (Paragraph X, Tr. p. 6) that these wrongful acts were continuing in their nature and were in pursuance of a plan. We submit that these allegations are but mere conclusions of law

and in any event are without significance. Apart from the amount of timber taken from the respective tracts of land, which plaintiff admits in its complaint was known to it, the time of the taking as to each tract was obviously susceptible of much more exact statement than that it was done at divers times during a ten year period which antedated the commencement of the action by at least fifteen years. By this allegation of continuity and plan plaintiff preliminarily, and as a matter of pleading, seeks to escape from the requirement of certainty in the complaint and then on the trial when plan and conspiracy are not proved we are told that a cause of action is stated anyhow and that the rest—including allegations describing the capacity in which defendant committed the conversions—is mere matter of inducement or surplusage, which may be disregarded.

We are not asking that the United States be held to any impossible requirements of certainty, although if there has been a great lapse of time since the commission of the conversion and the bringing of the action we do not see why this Court should deduce a rule of special convenience to this plaintiff already much favored by immunity from the statute of limitations. That the United States as a party plaintiff is bound by all the rules of pleading applicable to an individual is set forth in Topic V. *supra*. It is to be borne in mind that the United States as a party plaintiff has no monopoly of inconvenience resulting from such lapse of time. On the contrary it has at its command inexhaustible financial resources, the best legal talent obtainable, and

finally its own judicial officers who may be relied upon to see that it gets a square deal.

If this Court will read paragraphs IX. and X. of the complaint (Tr. pp. 5 and 6) it will be seen that the allegations therein by which plaintiff attempts to excuse itself from the necessity of pleading with the requisite certainty, would be much more appropriate if this suit were one in equity for a discovery and an accounting.

Once upon a time this plaintiff did attempt to frame a suit in equity involving timber trespasses in Montana and the Court we are addressing very properly held that equity had no jurisdiction of such a case and this decision was affirmed by the United States Supreme Court.

U. S. v. Bitter Root Development Co., 133 Fed. 274; 66 C. C. A. 652; 200 U. S. 451; 50 L. Ed. 550.

If the loose allegations in the complaint herein are to be held sufficient, then, we might as well frankly recognize that all that is required of the United States as a party plaintiff in an action for the conversion of timber is to allege that somewhere in the United States prior to the commencement of the action defendant converted so many million feet of lumber which at the time was the property of the United States and that said lumber was of a specified value. Should it happen that defendant has dealt in lumber or has sustained some remote relation to those who have dealt in lumber, then he will be well advised to compromise

the case, otherwise he will have to face trial without knowing what charge he is called upon to meet.

Without specifically drawing this Court's attention to the same an examination of the amended demurrer will show that the several elements of uncertainty existing in the complaint were raised in every conceivable form, also the question as to whether several causes of action therein were improperly united and that several causes of action were stated together in the same count.

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#### TOPIC X.

**THERE WAS IRREGULARITY ON THE PART OF THE COURT IN PERMITTING THE PARTIAL RE-READING TO THE JURY OF THE TESTIMONY OF THE WITNESS W. H. HATHAWAY AFTER THE JURY HAD RETIRED TO DELIBERATE ON ITS VERDICT.**

The jury retired for deliberation Friday, February 7, 1913, at 3.05 o'clock P. M. The next morning at 10.10 the jury returned into Court and the foreman stated that the jury would like to have read to it the testimony of the Government witnesses Hathaway, Mitchell and Moser. Thereupon the entire testimony of the witness Mitchell was read to the jury and a part of the direct testimony of the witness Hathaway from the beginning of his testimony to the first question and answer on the top of page 206 of the transcript. Thereupon the Court interrupted the further reading of the testimony and indicated its disapproval of the matter. Defendant's counsel took the position that to stop at this point would be most unfair to defendant (Tr. 783), as this



witness Hathaway in his cross-examination directly contradicts some of the statements he made on his direct examination. The Court finally permitted the reading to proceed, stating that they might finish the testimony of the witness Hathaway. Thereupon, the balance of the testimony of the witness Hathaway given on direct examination was read and the Court retired from the courtroom for a few minutes during which time the jurors consulted among themselves. Upon the return of the Court the foreman of the jury stated that the jury had come to the conclusion they did not require the reading of the testimony of the witness Moser and wanted to know was there any way in which counsel could agree not to read the rest of the testimony of the witness Hathaway. The Court told the jury that counsel had nothing to say about it and that it was for the jury to say about what they wanted to have their minds refreshed. The foreman stated the jury did not wish to hear any more testimony of the witness Hathaway and the Court said: "Very well, we will stop." Thereupon, defendant offered to read the cross-examination and recross-examination of the witness Hathaway and particularly that portion of the testimony of said witness Hathaway relating as to what disposition was made of the product of the Bonita Mill, but the Court refused to permit the reading of such cross and recross-examination, to which ruling of the Court defendant excepted.

This ruling is assigned as error (A. of E. No. 2) and the transaction in question will be found at Tr. pages 781-785.

It so happened that the effect of shutting out the reading of the cross and recross-examination of the witness Hathaway was peculiarly prejudicial to defendant inasmuch as that he flatly contradicted what he had said on direct examination in a number of important points. If this was error there can be no doubt about its prejudicial character. That it was reversible error is squarely held in

*Hersey v. Tully*, 8. Colo. App. 110; 44 Pac. 854.

The following extracts from the opinion in that case sufficiently show the reason for the rule:

"Some time after the jury had retired, a verdict not having been reached, they were brought into Court, and requested further instructions in the nature of information concerning a portion of the evidence. The stenographer then, by direction of the Court, and against the objection of the defendant, read to the jury from his notes the testimony of the plaintiff that the defendant had told him over the telephone that he would be responsible for the work. The jury thereupon again retired, and agreed upon a verdict in the plaintiff's favor. \* \* \*

"But, without regard to any question of the legal effect of this testimony, it was serious error to permit it to be read to the jury after the case had been submitted to them. They thus heard a portion of the plaintiff's testimony twice, and the last time disconnected from all the other evidence, so that they went back to their room with their memories refreshed as to this; and having listened to it out of its connection, they would be liable to give it an importance to which it was not entitled, and which they would not have given it otherwise. Upon each of the two grounds, namely, the error we have noticed and the insufficiency of the evidence, the verdict should have been set aside and a new trial granted."

The ruling was approved in the later case, in the same Court, entitled:

Fairbanks v. Weeber, 15 Colo. App. 268; 62 Pac. 368.

To the same effect is:

Padgitt v. Moll, 159 Mo. 143; 52 L. R. A., 854.

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## TOPIC XI.

**THE COSTS, TAXED AT \$1617.48, ARE EXCESSIVE AT LEAST IN THE SUM OF \$108.30, AND HEREIN THE COURT WILL BE ASKED TO CONSIDER THE PROPRIETY OF THE UNITED STATES AS A PARTY RECOVERING ANY COSTS.**

This Court and the Supreme Court of the United States have by their respective rules declared that when the United States is a party costs shall not be recoverable either for or against the United States or the other party to the litigation.

In any event the costs taxed were excessive in the sum of \$108.30 (A. of E. No. 58).

The bill of exceptions to the order taxing costs will be found at Tr. 788.

It will be noted that as to seven certain witnesses coming from without the Northern District of California their mileage allowance was computed upon the mileage actually and necessarily traveled by said witnesses within the district, whereas, we contend, the proper mode of computation was to allow not to exceed one hundred miles coming and one hundred miles returning for each witness, that is to say, not to exceed the sum

of \$10.00 for each witness, thus the witness Mitchell coming from Washington was allowed 806 miles in the State of California, or \$40.30, it being 403 miles from the Oregon State line to San Francisco by railroad. The Government witnesses coming from Montana were allowed on a basis of mileage from where the Central Pacific Railroad enters the State of California from Nevada.

The presentation of this point concerning which the Federal Courts in the ninth circuit are not in harmony is, considering the amount involved, done more in pursuance of what the writer conceives to be his duty to the profession and the Court and to bring about the settlement of a vexatious point in dispute than for the pecuniary advantage of his client.

It should be said that Rule 71, Subdivision 7, of the Court in which this case was tried, at the time this case was tried, provided as follows:

“7. In taxing costs, the following rules (among others) shall be observed:

“(a) The fees of witnesses for actual and proper attendance shall be allowed, whether such attendance was procured by subpoena or was had voluntarily.

“(b) Where a witness has attended from a point *without the district*, his mileage shall be taxed according to the distance *actually and necessarily travelled by him within the limits of the district*.

“(c) The mileage of witnesses attending from points *within the district* shall be taxed according to the distance *actually and necessarily travelled*. \* \* \*

The taxation as made was in accord with Subdivision B of Section 7 of said Rule 71. The question is as to



whether the rule is valid or not, for, of course, the matter is controlled by the Revised Statutes of the United States.

The cases in the trial Federal Courts in the ninth circuit in which varying conclusions have been reached are as follows:

- N. D. Cal. *Haines v. McLaughlin*, 29 Fed. 70;
  - S. D. Cal. *Lillenthal v. So. Cal Ry. Co.* 61 Fed. 622;
  - Dist. of Nev. *Hanchett v. Humphrey*, 93 Fed. 895;
  - Dist. of Oregon, *U. S. v. S. P. Co.*, 172 Fed. 909;
  - Dist. of Mont., *Hunter v. Russell*, 59 Fed. 964;
  - Dist. New Mexico, *U. S. v. Green*, 196 Fed. 255.
- 

Error has not been assigned so far as concerns the allowance of costs at all in an action in which the United States is a party, but this Court may notice a plain error even though it be not assigned. We suppose it will be said that the matter is too well settled—and settled by the Supreme Court of the United States that the United States as a party to an action is permitted to recover costs in its favor should it prevail, while its opponent, should he be successful, is not entitled to any costs—to permit of a consideration of the question.

*Pine River Logging Co. v. U. S.* 186 U. S. 279;  
46 L. Ed. 1164;

*U. S. v. Sanborn*, 135 U. S. 271; 34 L. Ed. 112.

Nevertheless, the Supreme Court seems to have been satisfied merely to follow what had been the prevailing

practice in the trial Courts of the United States rather than to consider the question fundamentally. The Court last mentioned has by rule provided that no costs shall be allowed in that Court for or against the United States (Rules of the U. S. Supreme Court, No. 24). A like rule is found in all the Circuit Courts of Appeal.

The gross injustice of allowing costs to the United States and none against it, is hard to tolerate with patience.

In the case of *United States v. Davis*, 54 Fed. 147, 4 C. C. A. 251, decided by the Circuit Court of Appeals for the eighth circuit, it was said (p. 153):

“At common law, costs, strictly speaking, are not recoverable as an incident to the judgment on the issues litigated. They are recoverable only when authorized by the statute. General statutes providing for the recovery of costs by the prevailing party have been held not applicable to the state or national governments, the principal ground for this ruling being the fact that the government in the absence of direct statutory authority, is not liable to be sued by its citizens. In England it was considered the prerogative of the King not to pay costs *and beneath his dignity to receive them*. 3 Cooley, Bl. 400.”

If not the dignity of the Government—then at least its respect for fair play, demands that a like stand be taken in the Courts of the United States.

## TOPIC XII.

**CONCLUSION. THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED; FAILING IN THIS, THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED UNLESS DEFENDANT IN ERROR CONSENT TO A MODIFICATION AND REDUCTION IN THE AMOUNT OF THE JUDGMENT TO THE SUM OF \$16,000.00.**

We contend for the many errors committed by the trial Court and which prevented defendant from having a fair trial the cause should be reversed and a new trial ordered, which will be, of course, subject to such rulings as this Court may determine on the questions discussed in this brief. However, should the Court not find that the errors committed compel this far-reaching result, then we contend that on no theory of the case should defendant be properly liable for a sum in excess of \$16,000.00, and that the order of this Court should be such as that the judgment heretofore entered herein should be modified accordingly.

White v. United States, 202 Fed. 501, 121 C. C. A. 33, *supra*;

Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771;

American Nat. Bank v. Williams, 101 Fed. 943, 947; 42 C. C. A. 101.

Dated, San Francisco,

January 22, 1916.

Respectfully submitted,

CHARLES S. WHEELER,

W. S. BURNETT,

*Attorneys for Plaintiff in Error.*

## APPENDIX I.

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### (A) THE STATUTORY LAW OF CALIFORNIA PRESCRIBING THE MEASURE OF DAMAGES IN CONVERSION.

That the rule announced by the Court is not the rule which has existed in California ever since the adoption of the codes, is perfectly clear.

Section 3336 of the Civil Code of the State of California declares:

“The detriment caused by the wrongful conversion of personal property is presumed to be:

“1. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and

“2. A fair compensation for the time and money properly expended in pursuit of the property.”

The foregoing statute covers all cases of innocent conversion. Cases of willful conversion are treated on the theory of *punitive damages* and are covered by Sec. 3294 of the same code.

Arzaga v. Villalba, 85 Cal. 193; 24 Pac. 656;

Lightner Min. Co. v. Lane, 161 Cal. 705; 120 Pac.  
771.

In Section 3336, relating to innocent conversions, were to be applied in the case at bar, it would be necessary to ascertain the value of the property “at the time of the conversion”. The “time of the conversion” in tim-



ber cases is the moment when the tree is severed from the stump.

There is no case in the State Courts in California involving the conversion of timber. Judge De Haven, in *United States v. McKee*, 128 Fed. 1006,—a California case—makes no mention of the California statute. But the State Courts have recently passed upon the analogous case of the breaking down and conversion of gold-bearing ore.

“For the wrongful conversion of personal property the damage allowed is its value ‘at the time of the conversion’, with interest, or, if ‘the action has been prosecuted with reasonable diligence’, the highest market value at any time between the conversion and the verdict, without interest, at plaintiff’s option. (Sec. 3336.) Treating the case as one for the conversion of chattels, *the conversion was complete when the defendants had mined the ore and mingled it with ore from their own mine. Its value at that time would not include the cost of milling* \* \* \* (p. 704).

“The net result is that the verdict for fifty-four thousand dollars is excessive. It should have been for only twenty-seven thousand dollars, which the jury found to be the *value of the ore before mining and milling*” (pp. 706-7).

*Lightner Mining Co. v. Lane*, 161 Cal. 689; 120 Pac. 771.

The foregoing decision makes it clear that, under the California rule in a timber case, the value “at the time of the conversion” would be the stumpage value.

In Nevada the rule, in cases of innocent conversion, is the same as in California. In *Ward v. Carson River Wood Co.*, 13 Nevada, 62, the Court (per Judge Hawley) said:

“The taking of the wood by Hawkins and others, under the unauthorized sales, with the intent to convert it to their own use, amounted to a conversion. \* \* \*

“The wood, as it was piled upon the ranches in Alpine county, belonged to the plaintiff and his predecessors in interest. It was there wrongfully converted by the defendant Hawkins and his predecessors in interest. *That was the place where the plaintiff's property was taken from him.* \* \* \*

“There is nothing in this case, calling for any special or exemplary damages, and hence the true measure of damages which the plaintiff was entitled to recover, was the value of the wood *at the time of the conversion*, with legal interest from that day up to judgment.”

Instead of instructing the jury that the measure of damages for innocent conversion is the value when the tree is first taken, with interest, the instruction complained of directed the jury, first, to find the *selling price* of the manufactured lumber, next to ascertain its cost of manufacture, and to bring in a verdict for the difference, with interest. *There was thus added to the statutory measure the element of profit upon the business of manufactuirng and selling lumber, with interest on that profit*,—an obvious and fatal departure from the statute.

Measured by the California rule, therefore, the instruction was erroneous.

**(B) THE STATUTORY LAW OF MONTANA IN FORCE SINCE 1895 PRESCRIBING THE MEASURE OF DAMAGES IN CONVERSION.**

The conversions alleged in the complaint are all claimed to have taken place prior to January 1, 1895.

The Civil Code of Montana went into effect at noon on the first day of July, 1895.

Civil Code of Montana, Section 4650.

Section 4333 of the Civil Code of Montana reads as follows:

“The detriment caused by the wrongful conversion of personal property is presumed to be:

“1. The value of the property at the time of its conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and

“2. A fair compensation for the time and money properly expended in pursuit of the property.”

It will be noted that the section just quoted is identical with the section of the California Civil Code upon the same subject.

It is to be further noted that Section 4651 of the Montana Code declares that no part of it “is retroactive, unless expressly so declared”; and also that Section 4654 declares that no right accrued is affected by its provisions.

As in the case of California, we have been unable to find any case in the State Courts of Montana involving the conversion of standing timber. Montana Courts, however, would unquestionably follow the construction of the statutory law by the Courts of California, seeing that the law was adopted as a whole from California, and in the case of *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656, *supra*, it was held, impelling the later ruling in the

case of *Lightner Mining Co. v. Lane*, 161 Cal. 705, 120 Pac. 771, *supra*, that the granting of punitive damages was referable to another Section of the code than that which defines the measure of damages for conversion. This result, of necessity, in cases of timber trespass, or underground mining trespass, makes the *time* of conversion referred to in the provision defining the measure of damages in cases of conversion relate to the time of the severance of the property from the freehold.

The case of *Lynch v. United States*, 138 Fed. 535, 71 C. C. A. 59 (ninth circuit) was one brought for cutting timber on the public domain in Montana subsequent to 1895. No mention is made of the Montana statute and the jury was instructed that if the conversion was an innocent one the Government was entitled to recover "merely the value of the timber as it stood on the land before being cut." Interest was neither sought nor allowed.



## APPENDIX II.

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**THE CASE OF UNITED STATES V. ST. ANTHONY R.R. CO., 192  
U. S. 524, 48 L. ED. 548, AND ITS RULING ON THE MEASURE  
OF DAMAGES, AS ILLUMINATED BY THE RECORD IN SAID  
CASE.**

Fortunately for our purposes, the case in question went to the United States Supreme Court from the Circuit Court of Appeals for this circuit. The record, therefore, is here and available for the Court's examination.

See

Transcript of Record and Briefs, U. S. C. C. A.  
No. 731.

The Court will find that it was there stipulated that the value of the timber as it stood upon said lands when defendant caused the same to be cut was \$1.50 per thousand feet. And it was further stipulated that "its value, upon delivery to defendant, was as alleged in the complaint", i. e., \$12.35 per thousand feet. By the stipulation it was agreed that the following questions, among others, be submitted to the Court for its decision:

"e. To what extent and for what amount is said railroad company liable, if at all, upon the above statement of facts and under the law as it shall be decided by the Court?"

The case was remanded for further proceedings, and it was the duty of the Court to fix the measure of damages which would give the Government its true measure.

In the brief filed in behalf of the United States in that case, the question of measure of damages is discussed on

pages 21 to 24, inclusive. This discussion begins: "Now, as to the second question, as to the measure of damages in case defendant committed trespass." Counsel for the Government, among other things, there declares (p. 21):

"When the defendant is an unintentional or mistaken trespasser, or his innocent vendee (the measure of damages is) the value at the time of conversion, less what the labor and expense of defendant and his vendor have added to its value."

Citing:

Bolles Wooden-ware Co. v. United States, 106 U. S. 432; 27 L. Ed. 230.

The defendant's discussion of the question of "Measure of Damages" will be found in the brief of the Defendant in Error, pages 21 to 31, inclusive, under the title of "Measure of Damages." Among other things they there contend (p. 22):

"(1) When the defendant is a knowing and willful trespasser (the measure of damages is) the full value of the property at the time of bringing the action, with no deduction for his labor and expense.

"(2) When the defendant is an unintentional or mistaken trespasser (the measure of damages is), the value at the time of conversion, less the amount which such trespasser has added to its value."

A review of the decided cases is made in the brief, among them United States v. Northern Pacific R. R. Co., 67 Fed. 890, relied upon by us here.

When the case went to the Supreme Court of the United States the same questions were presented. It is, therefore, idle to say that the St. Anthony Railroad

Case is not a direct authority upon the question here under consideration. It holds, and means to hold, that the measure of damages in cases of innocent conversion is the value of the timber converted *at the time and at the place where it is cut*.

No. 2503

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

A. B. HAMMOND,

VS.

THE UNITED STATES OF AMERICA,

*Plaintiff in Error,*

*Defendant in Error.*

**BRIEF FOR THE UNITED STATES**

JOHN W. PRESTON,

*United States Attorney for the  
Northern District of California.*

FRANK HALL,

*Special Assistant to the  
Attorney General.*

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





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No. 2503

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,

vs.

*Plaintiff in Error,*

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF FOR THE UNITED STATES

### STATEMENT

In this brief, we adopt the practice followed by plaintiff in error of designating A. B. Hammond as defendant and the United States as plaintiff.

The statement made by counsel for the defendant is, on the whole, fair; but it contains many conclusions, deductions and inferences not warranted by the record. It would serve no good purpose to review these errors in detail because many of them are wholly immaterial. Wherever such deductions are not warranted by the evidence, and are material, we shall discuss them under the proper topic.

**BRIEF****I. THE DEFENDANT IS LIABLE FOR THE CONVERSION.****A. The instructions given by the Court.**

“This is an action by the Government to recover from the defendant, A. B. Hammond, the value of a large quantity of lumber—stated in the complaint to amount to 21,185,410 feet, board measure—the property of plaintiff, alleged to have been appropriated and converted by defendant. In that respect it is alleged by the plaintiff that this lumber before its manufacture was in the shape of timber standing and growing upon certain public lands belonging to plaintiff described in the complaint, and that while so standing upon plaintiff’s said lands and the property of plaintiff, the defendant unlawfully and without right entered upon said lands, and cut down and felled it, carried it away and manufactured it into lumber, and sold and converted it to his own use and that of certain corporations named in the complaint. That is to say, the complaint alleges, in substantive effect, not that the defendant individually and unaided took this great quantity of lumber for and by himself alone, but that it was done through the instrumentality of the corporations named of which it is alleged the defendant was at the time the general manager, directing their business and operations in that regard, and that it was in this capacity that defendant committed the acts complained of through the aid and assistance of such corporations, and by that means converted the lumber to his own use and that of said corporations, whereby it was wholly lost to the plaintiff. It is charged that the acts of the defendant in taking and converting the lumber were committed wilfully and knowingly and

with full knowledge that it was the property of plaintiff, and that neither defendant nor said corporations had any right whatsoever thereto.

“Should you find these allegations of the complaint to be true; that is, should you find that plaintiff’s lumber in the quantity alleged, or in any less quantity, has been taken by the defendant for the purpose and under the circumstances counted upon, then under the law plaintiff will be entitled to a verdict against the defendant for the entire quantity of lumber so taken. This is so because the manner of the alleged taking and appropriation, if true, constitutes what is known in the law as a trespass or tort, in other words, a wrongful taking of property, and in such form of action each individual engaged in the wrongful act complained of is personally responsible for the whole amount of damage suffered through such wrong, no matter how many may have participated or been concerned therein and whether he has himself benefited much or little by such wrong. The law does not undertake to apportion between a number of persons engaged in a tortious or wrongful act the extent of each man’s individual responsibility as between themselves; they are left in that regard where their acts leave them. It gives to the party injured by the wrong a right of action for its redress, and where the act is committed by more than one, he may sue one or more or all as he sees fit and recover the entire loss to which he has been subjected from the one or more he elects to sue. It will not be material in this case, therefore, should you find that plaintiff’s property has been taken by defendant in the manner alleged, whether the defendant reaped the whole or only part of the fruits of such taking; he would be responsible to plaintiff in either event for the entire loss suffered by it, precisely as if he had received



all the benefit therefrom. On the other hand, the party injured has under the law but one right of action for the wrong, and if he elects to sue one of a number of wrong-doers or joint tort-feasors, as they are termed in the law, and fails to secure full redress, his right is at an end and he cannot then resort to further action against the others.

“You will understand, in determining defendant’s responsibility, that the mere fact that the defendant happened to be a stockholder or an officer of a corporation which may have been guilty of converting the lumber in question, and of which he may have received a part of the benefit, would not of itself, in the absence of some showing of his personal participation in such conversion, render him individually liable therefor. There must appear some act on his part disclosing an intent and purpose to aid and assist in such wrongful act of a character to show that he was aware of the purpose intended to be accomplished. Participation, in the sense here employed, does not mean a mere passive acquiescence in the acts of others when no active aid is given or encouragement lent to the commission of the wrong. In other words, to make the defendant liable, the evidence should show, not only that the lumber in question was the property of the United States, but that the defendant Hammond either directly or through his agents, or jointly with some other person, did some act which was inconsistent with such title and right of possession of the plaintiff and tended to some positive extent to deprive it wrongfully of its property. If any such acts by the defendant are shown by the evidence, then the defendant is liable.

“If you find that any of the timber for the conversion of which the action is brought, belonging to the United States, was taken and

converted by W. H. Hammond, sometimes called Henry Hammond, or G. W. Fenwick, or Fred Hammond, or any of the corporations named in the complaint, but without the aid, connivance or participation of the defendant in any manner, then although the proceeds of such conversion or some part thereof may have been subsequently paid to or came in the course of business to a corporation of which the defendant was a stockholder or officer, the defendant would not be liable for timber or its proceeds so converted. But if you find that timber so taken and converted, although ostensibly taken in the name and for the benefit of said parties named, or any of them, was in fact taken for the benefit of defendant and his associates, with the aid, connivance and at the direction of the defendant in the manner alleged, then the defendant would in law be a participant in such taking and would be personally liable therefor, no matter where the proceeds eventually went. Any act of wilful interference with property such as that sued for herein, without lawful justification, whereby the person entitled thereto is deprived of its possession, is a conversion. A person may be guilty of a conversion of property without himself personally and directly performing the act of taking or carrying it away. If it is taken by his aid and connivance or at his instigation or direction, although the physical taking is by and in the name of others and without his immediate presence, he is nevertheless responsible as a participant.

“The theory advanced by the plaintiff in this case as to the method pursued in the alleged conversion is that the lumber sued for was taken as the result of a continuing series of acts covering a number of successive years, but all a part and parcel of one general unlawful scheme and arrangement entered into between the de-

fendant and his associates under the guise and form of different corporations organized by them with the intent, and designed to accomplish their purpose, of appropriating such lumber; and that the operations to that end were carried on by such corporations by the means of establishing different mills and logging camps in the names of, or conducted by, different individuals or corporations, but all in fact connected and acting in concert, and all under the general direction and management of the defendant for said corporations. Not that the defendant was absolutely in control of such corporations or nominally their general manager, but that the operations carried on to take and appropriate the plaintiff's lumber were in a general way under defendant's direction and control. If you find that this theory is sustained by the evidence, it would establish an unlawful taking and it will not be material to the defendant's responsibility that he should be shown to have been immediately present on each occasion that lumber was taken and personally directing the operations. It will be sufficient if it appear that any lumber so taken was cut and carried away as a result of the general directions or instructions of the defendant in pursuance of such concerted plan, and was subsequently appropriated by defendant for the benefit of himself and the corporations named with a knowledge that it was the property of the plaintiff.

“In determining the truth of this theory, you may consider the relationship, if any, by blood, marriage or otherwise, shown to exist between the defendant and those immediately employed or engaged in the mills and logging camps in taking off the timber during the period involved from the lands in question, and all other facts and circumstances shown which in your judg-

ment tend to throw light upon the question of the defendant's responsibility in the premises."

## **B. The instructions refused by the Court.**

I. "The fact that the defendant happened to be a stockholder or an officer of a corporation, which corporation may have been guilty of conversion, does not, of itself, in the absence of his personal participation in such conversion, render him individually liable therefor."

II. "One does not become liable merely because he does not endeavor to prevent an act of conversion."

III. "In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find that the defendant never came into possession of the timber, and never purported to assume or assumed control over it, then your verdict must be for the defendant."

IV. "I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut."

V. "If you find that any of the timber, for the conversion of which this action is brought,



belonged to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them, the purchase price which was received for such timber so converted was paid to any corporation in which the defendant was a stockholder or officer; yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, or does this constitute a conversion by defendant of the plaintiff's property."

VI. "I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant."

X. "A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in Section 22, Township 14 north, Range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless

he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, sale, or disposition. Even a knowledge upon A. B. Hammond's part that Boyd was an employee of the corporation and was cutting timber for the corporation, would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd's cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd."

XI. "If you believe from the evidence that Henry Hammond, during the period while the Edgar claim was cut, was the sole owner of the Bonner mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber."

XII. "If you find from the evidence that timber was cut from Lot 10, in Section 18, by the Big Blackfoot Milling Company at a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said timber. If he knew nothing about the taking thereof, and took no personal part therein, he would not be

liable, although the corporation in which he was a stockholder and director would be liable."

XIII. "Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof."

XIV. "If you find from the evidence that the Montana Improvement Company erected the Bonita mill and sold the same to Fred A. Hammond, and that Fred A. Hammond in turn sold the same to George W. Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant A. B. Hammond had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs is a question for the jury. But even if the Montana Improvement Company should be found by you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of

the Montana Improvement Company, or was an officer thereof. As already said to you, in the case of a corporation, a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion."

### **C. Who liable for conversion.**

Counsel for defendant take the position that under the law, the defendant did not sustain such relation to the conversion as to make him liable therefor. They say there was no evidence to show that he was agent for any of the persons or corporations actually engaged in the cutting or conversion of the timber, that he did not directly derive any profit therefrom and the mere fact that he was an officer and director of the corporations concerned is not sufficient to fasten liability upon him. It is well settled that one who participates by instigating, aiding or assisting another is liable in trover. This was the theory on which the Government's case was framed and tried, and the theory adopted by the Court in its instructions, which fairly and fully submitted to the jury the question as to whether or not the defendant did instigate, aid or assist others in converting the timber from the lands described in the complaint.

"Every person is liable in trover who per-



sonally or by agents commits an act of conversion, *or who participates by instigating, aiding, or assisting another, or who benefits by its proceeds in whole or in part.*" (Italics supplied.)

38 Cyc. 2054-2055.

In the case of *Longfellow vs. Lewis*, 15 Fed. Cas. No. 8487, 2 Hark. 256, the Court said:

"All who are concerned in such transactions, thus interfering and dealing with the property of another, so that the same is lost to its true owner, are clearly accountable to him for its value, and are guilty of a conversion of the property."

And in the same opinion it is also said:

"If by the acts of defendant the plaintiff has been deprived of his goods, it is wholly immaterial whether the defendant did or did not profit thereby."

See also:

*U. S. vs. Humphries*, 149 U. S. 277; 37 L. Ed. 734.

*U. S. vs. Baxter*, 46 Fed. 350, 353.

*U. S. vs. Taylor*, 35 Fed. 484, 486.

The case of *Cone vs. Ivison*, 35 Pac. 933, considered very fully the question as to who may be liable for conversion. On page 938 the Court said:

"It necessarily results from what has been said, in connection with what we will hereafter state, that the allegation of the sale sets forth that character of sale which was, as against the plaintiff, a tortious conversion of the property by the parties making the sale; and here we are met with this contention: 'It is believed

to be beyond question, as a legal proposition, that there cannot be a conversion of personal property without possession. There is not a word in the petition to show that defendant ever had possession of the property. Therefore, he could not be guilty of a tortious conversion thereof.' In answer to this, I have but little to say. It is an astonishing proposition as applied to the facts of this case, as we view the facts. Lawrence & McGibbon did an act which was a tortious conversion of personal property as against the plaintiff. They did this act at the 'instigation' of defendant, who had full knowledge of plaintiff's rights. How, then, can it be seriously asserted for one moment that the defendant is not guilty of precisely the same offense, the same trespass, the same wrong, which Lawrence & McGibbon were guilty of? It is useless to discuss the matter; the true doctrine is so entirely elementary. At page 36 of the fourth book of Blackstone's Commentaries, the distinguished author states: 'In treason all are principals *propter odium delicti*. In trespass all are principals because the law, "*quae de minimis non curat*," does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that "*accessorius sequitur naturam sui principalis*," and therefore an accessory cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present and assisting, he would have been guilty as principal of petit treason, and the stranger of murder.' If, under the law, one who instigates another to the commission of a crime is guilty as principal, how can it be doubted that one who instigates another to the commission of a civil wrong is

as completely a principal as he would have been had he actually performed the wrongful act himself? *Henderson vs. Foy* (Ala.), 11 South. 441-442.”

In the case of *Clark vs. Whitaker et al.*, 19 Conn. 319, the Court on pages 327-328 said:

“With respect to the defendant Hall, although it was not shown that he was personally engaged with the defendant Clark in the acts of taking possession and using, consuming and disposing of the property, it was satisfactorily proved, by the testimony of William Clark, if it was entitled to credit, that he cooperated with that defendant in those acts, by aiding and abetting him in doing them, and by his subsequent recognition, approval and adoption of them. \* \* \* Other circumstances also, which need not be detailed, supported the claim that Hall cooperated with the defendant Clark. No argument is necessary to show that the testimony of this witness, if credible, was abundantly sufficient to prove a combination between them.”

In discussing the liability of the defendant Whitaker in the same case, the Court on pages 328-329 said:

“The testimony adduced to show that the defendant Whitaker acted with the other defendants in the conversion of the property, is by no means as satisfactory as that relating to them. That there was evidence, however, conducing to prove that he cooperated with them, cannot be questioned. There was nothing to show that he had any active personal agency in the taking of the property, or the subsequent use or disposition of it; but various circumstances were stated, by the witness Clark, which tended to

evince that he advised and assisted in the measures which the plaintiff claimed to have proved were taken, for the purpose of enabling the defendant Clark to obtain possession of it; that the acts constituting a conversion of it were done, at least in part, for his benefit; and that he subsequently approved and adopted them.

\* \* \* \* It was all properly submitted to the jury, whose province it was to determine its credibility and weight. The court are not of opinion that their verdict is so manifestly wrong, in this respect, that it is our duty to disturb it."

#### **D. The evidence of the defendant's participation in the conversion.**

It is the contention of the Government that the defendant so far participated in the conversion by instigating, aiding and assisting the others as to render him liable. The instructions of the Court were clear and positive that he could not be held liable unless the jury believed, from a preponderance of the evidence, that the timber in question was converted with the aid, connivance and direction of the defendant. The jury evidently was convinced by the evidence that the defendant did aid, connive and direct the operations of the several corporations which received the benefit of the conversion.

Counsel for the defendant in their brief dwell at length upon the clear and positive testimony offered on behalf of the defendant to the effect that the defendant was not solely in charge of the cutting of the timber, but that he was merely a stockholder and officer in the several corporations concerned.



We submit that the testimony offered on the part of the plaintiff was sufficiently clear and convincing of defendant's knowledge, participation and assistance in the conversion to fully warrant this Court in sustaining the judgment. The evidence as a whole shows that he was not only one of the largest stockholders in the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company and the Missoula Mercantile Company, but that he had supervision and direction of the affairs of these corporations and the cutting and conversion of the timber in question, and that he was personally and directly responsible for the acts complained of. If it had not been for his assistance, through his relations with the organization and conduct of these corporations, we submit that the timber in question would never have been converted. The record in this case abounds with instances of his personal conduct and supervision and direction of the men who were employed in cutting and sawing the timber. We shall not burden the Court with going into all of these circumstances, but content ourselves with pointing out the more prominent facts which support our contention.

WILLIAM GREENE testified (Tr. p. 79) that he was employed to work in cutting timber in the Big Blackfoot country in 1887 by A. B. Hammond. He dwells at length on the logging operations which were conducted in the cutting of the timber in question, and said (Tr. p. 80) that he supposed that he

was working for Mr. A. B. Hammond. With respect to the manner in which he was paid for his services, he said (Tr. pp. 81-82) that during all the time he was working in the Blackfoot country, he was paid for his services by checks on a concern supposed to be the Missoula Mercantile Company; that these checks were paid by the Missoula Mercantile Company in its office in Missoula. Upon cross-examination, he said (Tr. p. 83): "When I was employed in the Blackfoot country, Mr. A. B. Hammond hired me right at Missoula. When I was employed by Mr. A. B. Hammond, I went up to him and asked him if he wanted any more men in the woods, up at the camp. He said he did and took my name down and I went up and went to work. He told me to go to headquarters camp. I don't recollect ever seeing Mr. W. H. Hammond up there in the woods." Further, on cross-examination, he said (Tr. p. 84): "I said in substance: 'Do you want any more men to go up in the woods?' and he (A. B. Hammond) said 'yes' and put my name down." On redirect examination he said he went to the State of Montana at the instance of Mr. Thomas Hathaway.

MR. R. K. McLAUGHLIN, one of the plaintiff's witnesses, testified that during all the time he was working in the timber in the Blackfoot country, he was paid by the Missoula Mercantile Company (Tr. p. 87). He also testified (Tr. p. 88) that one time while working in the Blackfoot country, he was sent down to Missoula with some horses that had been used in the logging operations. He placed the horses in A.

B. Hammond's barn and Mr. Hammond told him to fix the horses up for sale. On cross-examination, he testified that he had seen Mr. A. B. Hammond in the woods on the Blackfoot at one time and that the circumstances were such that he judged Mr. Hammond was up there on a general tour of inspection. He further testified (Tr. pp. 89-90) that while he was working in the Blackfoot country, his time was all forwarded to the Missoula Mercantile Company, and that when he wanted money, he applied to John Keith in the Missoula Mercantile Company's store. On direct examination, he testified (Tr. p. 91) that it was Mr. A. B. Hammond who told him the price at which the horses that were sent in from the Blackfoot country were to be sold, and (Tr. p. 92) that his talk with Mr. A. B. Hammond about the horses was to the effect that he was to put the horses in the barn, clean them up, take care of them and get them ready for sale, and that Mr. A. B. Hammond told him the price at which the horses were to be sold.

SYDNEY C. MITCHELL (Tr. p. 93) was employed by Mr. Hammond to work at Wallace for the Eddy-Hammond Company about May or June, 1886. During the year 1887, he was employed as shipping clerk at the Bonita mill. All of the statements of the shipments of lumber were made out by the witness and mailed to the Missoula Mercantile Company. This practice was continued throughout the year 1887. In 1889 he was employed at the Bonner mill. The shipments of lumber were made in the name of W. H. Hammond or Hammond & Company. The

invoices were made regularly in the mill and forwarded to the Missoula Mercantile Company, to the lumber office. This lumber office was in the Missoula Mercantile Company's establishment. From the fall of 1887 until January, 1888, the witness was employed in the lumber department of the Missoula Mercantile Company. He was assistant to Mr. Winstanley in that office. It was located in the office and store of the Missoula Mercantile Company—the same room. The relation of both the Bonita and Bonner mills and the authority exercised indiscriminately by both A. B. Hammond and Henry Hammond, is well illustrated by the testimony of the witness (Tr. p. 97) where he says that during 1885, Mr. Henry Hammond sent him to the Bonita mill to take care of the books there. This witness was always paid by orders on the Missoula Mercantile Company (Tr. p. 97); he was not paid by time check, but was given such orders during all the time he worked at the Bonita mill (Tr. p. 98). The witness, Fenwick, attempted to testify that all of his transactions regarding the lumber manufactured at the Bonita mill were carried on independently of the Missoula Mercantile Company, but this witness testified (Tr. p. 100) that the lumber was shipped direct to the mines at Anaconda and that the bills showing the contents of cars shipped were transmitted to Missoula. He testified that the men employed by Mr. Fenwick at the Bonita mill were paid with orders on the Missoula Mercantile Company (Tr. p. 105). The regular monthly payroll was made out and sent down to the Missoula Mer-



cantile Company's store. The billing of the lumber and collecting therefor was done from the Missoula Mercantile Company's store (Tr. p. 106).

FELIX CYR saw Mr. A. B. Hammond about the Bonita mill during the time he was employed there (Tr. p. 110). He gave the witness instructions in regard to his employment about the mill. One time when Cyr was working in the place of his father, the defendant inquired of him why his father was not driving the team and instructed the witness not to work any more, but to have his father take charge of the team. He further testified (Tr. pp. 111-112) that the defendant used to come to the mill occasionally, and the witness understood that Mr. A. B. Hammond was the head man at the mill. He received time checks on the Missoula Mercantile Company for his services.

WILLIAM A. COOK testified (Tr. p. 123) that Mr. Eddy, of the firm of Eddy-Hammond & Company, was in charge of the work of installing the mill at Bonita, that Mr. A. B. Hammond was a member of that firm and was at the mill site several times while the witness was constructing the siding. He also overheard a conversation (Tr. p. 132) between Mr. A. B. Hammond and a man named Ritz with respect to some logs that had been cut by Ritz supposedly under a contract with Hammond, but which Ritz had afterwards sold to other parties. Hammond finally received the logs.

MILTON HAMMOND, a distant relative of the de-

fendant, testified (Tr. pp. 139-140-141) that he was sent up in the Blackfoot country in September, 1887, by A. B. Hammond, and that his wages were paid by a check on the Missoula Mercantile Company. He further testified (Tr. pp. 147-148) that he had seen Mr. A. B. Hammond at the Bonita mill on his tours of inspection.

JAMES VAN KEUREN testified (Tr. pp. 149-151-2-3-4) that he was induced to go from the State of Idaho to Missoula, Montana, by Thomas Hathaway, who took him to the office and introduced him to Mr. A. B. Hammond. Mr. A. B. Hammond inquired in regard to his capabilities as a workman and then employed him to work at Wallace. He sent him there with a letter to Henry Hammond who had no work for him at Wallace, but secured employment for the witness at Bonita in the fall of 1885. At that time the mill had already been established on Section 14 in the Hellgate River country. He was paid for his services in the office of the Missoula Mercantile Company, sometimes in cash and sometimes by check. In 1886 he had a contract to deliver logs to the Bonita mill. This contract was brought about by the efforts of Mr. Hathaway, who induced Mr. Fenwick to employ the witness. In order that he might be able to fulfil his contract, it became necessary for him to purchase a number of horses. With respect to the purchase of these horses, the witness said (Tr. pp. 151-152): "As to these horses, I got one pair at Bonita from Mr. Fenwick and I got two more horses through Mr. Hammond in Mis-

soula, bought one direct from Mr. A. B. Hammond and Mr. Hammond got me the other one. I gave Mr. Hammond credit on the amount they owed me for the horses that Mr. Hammond turned over to me on the contract under which I had been logging." Witness further said that the Missoula Mercantile Company supplied him with tools and supplies and he paid for them out of the money that was coming to him from this logging contract. From the testimony given by the witness (Tr. pp. 152-3), it appears that this contract was made entirely by Mr. Hathaway, but that the logs were delivered to the Bonita mill which was then being operated by Mr. Fenwick. After he completed this contract in the spring of 1886, he called upon Mr. A. B. Hammond at the office of the Missoula Mercantile Company in Missoula, and Mr. Hammond sent him up to the Blackfoot River to drive a team. His testimony on page 154 shows clearly that his contract for logging to the Bonita mill in 1886 was made directly with the Missoula Mercantile Company.

PATRICK JOYCE testified (Tr. pp. 156-9) that he was employed in cutting timber in the Blackfoot country in 1885 and 1886, and was paid for his services in supplies by the Missoula Mercantile Company, that he was given an order by Mr. Henry Hammond for the balance due him for his services on the mercantile store at Missoula. While he was working for George Hammond at the Fish Creek camp, he saw A. B. Hammond on the drive in the spring of 1886. At that time he heard a conversa-

tion between A. B. Hammond and George Hammond concerning the employment of men in the logging operations. At that time quite a few men were quitting and being discharged and they were short handed. In this conversation A. B. Hammond told George Hammond that if this condition was not remedied that George Hammond would be relived from his work there.

JOHN GRAHAM stated (Tr. pp. 161-2) that he was employed in logging in the Blackfoot Valley in 1886. He worked a while in the different camps under men who were employed in logging and driving the logs to the Bonner mill. He did not know to whom these camps belonged, but his services were paid for with orders on the Missoula Mercantile Company's store at Missoula. In 1887 he was in the office of the Missoula Mercantile Company to get his pay and met Mr. A. B. Hammond, who asked him in regard to the number of logs that had been sent down in the drive.

M. J. HALEY was special agent of the General Land Office during the years 1886 and 1887. He made an examination of the Edgar tract of land and determined the amount of timber that had been removed therefrom. He had some conversation with Henry Hammond in regard to the Edgar cutting, and also testified (Tr. p. 167) that he had a conversation with A. B. Hammond about the general cutting up and down the Big Blackfoot River. He could not remember what Mr. Hammond told him,



but knew that he asserted they were cutting within legal bounds. He further testified:

“Q. That is, he, and the other Hammonds, they were cutting on the Blackfoot and they were living within the law.

A. That the company, I don't remember the exact statement, but it was to that effect, that they were. (Witness continuing): I think we had a talk about it two or three times, perhaps oftener than that.

Q. Did Mr. Hammond, or did he not, assume to be in control or have anything to do with that cutting that was then going on on the Blackfoot River?

A. He let me know that he was the head of the whole thing.

Q. What did Mr. Hammond say to you?

A. I don't remember what he said, but the impression he gave me was that he was the—that it belonged to the company.”

The testimony of this witness is amply sufficient to show that the defendant was thoroughly conversant with the operations here complained of, and approved the same.

CHARLES T. McCULLACH testified (Tr. pp. 171-2) that while he was employed at the Helena yard, A. B. Hammond came there and looked over the business in a general way. He had access to the books

of the company at that time. The final arrangements resulting in his employment as manager of the D. H. Ross & Company yard were made by A. B. Hammond personally. While he was employed at Helena, his instructions were to use everything he could from the Bonner mill and only buy from outside mills when the specifications called for material that he could not get at Bonner. While he was employed at Helena, the officers of the company told him that a man named A. B. Hammond owned the mill. Mr. Hammond was not an officer of the corporation, but was recognized as the general financier of the company. He came to both places where the witness was employed and examined the books. The only thing that he could remember concerning which Mr. Hammond gave him specific instructions while he was employed by the Helena Lumber Company was with respect to certain stock subscriptions to the corporation. When the witness was employed by the Big Blackfoot Milling Company, Mr. A. B. Hammond made the final arrangements for his employment and the salary he was to receive.

THOMAS G. HATHAWAY testified (Tr. pp. 199-201) that Fred A. Hammond, while running the Bonita mill, had a contract with the Montana Improvement Company and the latter handled the lumber. Mr. A. B. Hammond was a stockholder of the Montana Improvement Company. In 1885 or 1886, the officers of the Montana Improvement Company heard of threatened suits by the Government and commenced to close out its lumber business. In regard to the

affairs of the Montana Improvement Company, Mr. Hathaway testified that he looked to A. B. Hammond for his orders, that Mr. Hammond was his manager and the witness an assistant. On page 204 he testified that he thought it was the Blackfoot Milling and Manufacturing Company that handled the biggest part of the output of the Bonita mill after Fenwick commenced to operate it. Some criticism has been offered to the testimony of this witness on account of his lack of clearness, but we submit that, when taken as a whole, it shows conclusively that the affairs of the Montana Improvement Company, Missoula Mercantile Company, Blackfoot Milling and Manufacturing Company and Big Blackfoot Milling Company were so closely associated as to make them practically one concern, and that defendant, A. B. Hammond, was the dominant figure in the business affairs of all of them. On page 216 of the transcript, he testified that A. B. Hammond was the general manager of the Missoula Mercantile Company in 1886 and 1887. He said, "A. B. Hammond, then, I suppose was the manager really, the head man of the Missoula Mercantile Company's management." There can be no doubt that the Bonita mill was erected by the Montana Improvement Company in 1885 (Tr. p. 224). The testimony of this witness (Tr. pp. 225-6) shows clearly that Mr. Hammond was thoroughly conversant with all the transactions complained of in this suit. With respect to the sale of the Bonita mill by Fred Hammond to George W. Fenwick, we invite the Court's attention to the

testimony of this witness on pages 236-241 and insist that this testimony alone is sufficient to show that the defendant participated in the conversion complained of by instigating, aiding and assisting those who actually cut and removed the timber.

THOMAS WELCH testified (Tr. pp. 243-4) that he was employed by Mr. A. B. Hammond in 1886 to work at the Bonita mill.

GUST MOSER (Tr. pp. 250-2) was secretary and credit man of the Missoula Mercantile Company, secretary of the Blackfoot Milling and Manufacturing Company, and the secretary of the Big Blackfoot milling Company. He testified that A. B. Hammond was in the immediate charge of the business affairs of the Missoula Mercantile Company during the time the timber was cut and removed, and that the defendant was president of the Blackfoot Milling and Manufacturing Company. He had heard conversations between Henry Hammond and the defendant about the price of lumber and the price that they should pay for the cutting of logs, and things of that sort. These matters were discussed every time that Henry Hammond came into the Missoula Mercantile Company's office.

JOHN CUNNINGHAM (Tr. pp. 266-7) was employed by Mr. Hathaway in Minneapolis. Mr. Hathaway had been sent to Minneapolis by Mr. Hammond and others to employ help in logging. When the witness arrived in Missoula he went to A. B. Hammond,



who told him to go up the Blackfoot River and report to George Hammond at the headquarters camp at Fish Creek. During the time that he was employed by W. H. Hammond in logging on the Big Blackfoot River, he was paid by checks which were cashed at the Missoula Mercantile Company's store. When the witness was first employed by Mr. Hathaway, Mr. Keith directed him to report to A. B. Hammond. He and others went into the store and told Mr. Keith what they came for and he told them to go and see A. B. Hammond. Mr. Hammond gave them a team and sent them up the river (Tr. p. 275).

C. H. McLEOD (Tr. p. 289). The arrangements between Fenwick and the Missoula Mercantile Company, by which the account of the former with the latter was established, was made with the board of directors of which Mr. A. B. Hammond was a member. A. B. Hammond was a director and stockholder of the Big Blackfoot Milling Company. This witness also testified with respect to the assessment of the property of the Missoula Mercantile Company and stated that, as a general rule, the assessment list was finally approved by the board of directors before it was handed to the county assessor. This testimony is important because it shows that the assessment of the Bonner mill to the Missoula Mercantile Company was made with the approval of the board of directors of that corporation.

The extent of the defendant's ownership of stock in the Missoula Mercantile Company is shown by

the statement on pages 295-6 of the transcript. The minute book of the Missoula Mercantile Company shows (Tr. pp. 297-371) that the defendant A. B. Hammond was at all times a stockholder and director of the corporation. Most of the time he was the president and general manager, the remaining portion of the time he was vice-president. The record further shows (Tr. pp. 371-3) that he was one of the incorporators of the Big Blackfoot Milling Company.

Plaintiff's exhibit No. 5 (Tr. pp. 404-5), exhibit No. 6 (Tr. pp. 405-6), exhibit No. 7 (Tr. p. 406), exhibit No. 8 (Tr. pp. 406-7), which were certified copies of duplicate assessment books of Missoula County, Montana, for the years 1891, 1892, 1893 and 1894, disclose that the land upon which the Bonner mill was situated was assessed to the Missoula Mercantile Company. Exhibit No. 9 (Tr. pp. 407-8) discloses that the Missoula Mercantile Company was assessed for the year 1890 with the value of 6,750,000 feet of lumber and 4,000,000 feet of logs. Plaintiff's exhibit No. 10 (Tr. p. 408) discloses that the Bonner mill property was assessed to the Missoula Mercantile Company for the year 1890. Exhibit No. 11 (Tr. pp. 408-9) discloses that the Bonner mill property was assessed to the Missoula Mercantile Company for the year 1895.

The testimony of John M. Keith (Tr. pp. 418-429) is very important because it discloses the relations of the defendant A. B. Hammond to the transactions

complained of, and specifically details the assistance that was given by the Missoula Mercantile Company to Mr. Fenwick and W. H. Hammond in their timber business, and we invite the Court to read carefully the testimony of this witness. With respect to the sale of the Bonita mill by Fred A. Hammond to George W. Fenwick, this witness stated that Fenwick paid Hammond with notes, that the Missoula Mercantile Company took over these notes and handled them, that the notes given by Fenwick in purchase of the mill were taken over by the Missoula Mercantile Company in settlement of Fred Hammond's account with the company. It would thus appear that Fred A. Hammond was indebted to the Missoula Mercantile Company for the purchase price of the Bonita mill, and that when the sale was made from Hammond to Fenwick the notes of Fred A. Hammond held by the Missoula Mercantile Company were paid by the notes of Fenwick given to Fred A. Hammond, and the participation of the mercantile company in this transaction made it possible for both Hammond and Fenwick to conduct the mill at Bonita and thereby convert the timber cut from the public lands.

The testimony of the plaintiff, as well as the testimony of the defendant, clearly and conclusively show that the timber in question was cut and removed with the aid and assistance of this defendant, and we submit that the evidence is amply sufficient to support the verdict of the jury. It cannot be doubted, to give the defendant the most favorable

consideration, that there was some competent evidence to show that he was liable and that it was the duty of the Court to submit the question to the jury for its determination. The jury determined this question in favor of the plaintiff, and it is not for this Court to say that their conclusion was not correct merely because this Court may view the evidence from a different standpoint than it was viewed by the jury.

**II. THE ACTS OF MARCH 3, 1891. (Act of March 3, 1891, Chap. 561, 26 Stat. L. 1095; and Act of March 3, 1891, Chap. 559, 26 Stat. L. 1093).**

**A. Neither Act of March 3, 1891, affects defendant's liability for the timber cut from the lands along the Hellgate River.**

Counsel for defendant attempt to demonstrate the error of the Trial Court in refusing to give a peremptory instruction to the effect that the Government was not entitled to recover for any timber cut prior to the taking effect of the Act of March 3, 1891. In the beginning, it would be well to note that the lands embraced within the trespass here complained of are divided into two classes, namely, those which were mineral and those which were non-mineral. The defendant pleaded in his answer that the timber which was taken from the lands in the Hellgate country was taken under the permission granted by the Act of June 3, 1878 (1 Supp. to U. S. Rev. Stat. 1874-1881, p. 327), and some evidence was of-



ferred to show that the lands situated in the Hellgate country were mineral lands within the meaning of the Act, and that Mr. Fenwick had complied with its provisions and the rules established thereunder by the Secretary of the Interior. No such contention was pleaded or attempted to be proven with respect to the lands situated in the Blackfoot River country. In so far as the lands situated in the Hellgate country are concerned, it is immaterial which of the Acts passed March 3, 1891, is now in effect, because Section 8 of both Acts indicates clearly that it was the intention of Congress that Section 8 should apply only to timber lands and should not apply to mineral lands as defined by the Act of 1878. In both Acts the following language is used: "It shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands," etc. In the amending Act of March 3, 1891, it is specifically provided "but this Act shall not operate to repeal the Act of June 3, 1878, providing for the cutting of timber on mineral lands." Having used the two terms "timber lands" and "mineral lands" in the amendatory Act which was passed on the same day as the original Act, it cannot be said that Congress employed the term "timber lands" in the original Act in the sense that it should include mineral lands on which timber was growing. It is undoubtedly true that where the words "timber lands" are used in the first Act passed on the 3rd of March, 1891, they were used in the same sense and with the same distinction that was intended in the amendatory Act of that date. It there-

fore follows that by no construction can it be said that Congress intended that the Act, which we here designate as the first Act, was in any manner to repeal or amend the Act of June 3, 1878 relating to cutting on mineral lands. The defendant having pleaded the Act of June 3, 1878, and attempted to show that the lands along the Hellgate River fell within the classification there contemplated, cannot now say that either Act of March 3, 1891, is a bar to the recovery by the Government for the timber cut and removed from those lands. He is bound by his allegations, and his plea for the benefit of the statute of 1878 made upon the trial debars him from now claiming that the lands along the Hellgate River were non-mineral in character and that he is entitled to the benefit of the first Act of March 3, 1891.

### **B. Which Act is in effect?**

By a very adroit argument, counsel attempt to demonstrate that Section 8 of the first Act is the one now in effect. They say that a careful reading of the Congressional Record has failed to disclose which Act was first signed by the President, and that it would at least seem morally certain that the original Act had not been approved by the President at the time when the amending Act went through the House and Senate. This statement is without weight because it is notoriously true that the Congressional Record does not disclose the time of signing of a bill by the President; and their sec-

ond conclusion presupposes that Congress was ignorant of the laws it had already passed and which were then in effect, a presumption which a Court will never indulge in in determining the validity or existence of a law.

A very novel contention is made (brief for plaintiff in error, pp. 130-131) to the effect that if the first Act of March 3, 1891, was not signed and had not become law upon the passage of the amendatory Act, the latter would be void because there was no law in existence upon which it could operate. This is the first time that we have heard such an argument advanced in statutory construction. An examination of the amendatory Act shows that it is complete and all-sufficient within itself. It does not attempt to amend the first Act by simply striking out or inserting specific words or sentences which, if it had been done, might lend some support to the argument advanced, but it re-enacts as an entirety that which was contained in the first Act of March 3, 1891, together with the portions of the section which were added to the first Act, so that, as finally passed, the amendatory Act was full, definite and complete. If we may speculate upon the intention of Congress, it may be concluded with confidence that the error contained in the first Act was perceived immediately upon its passage, and by the passage of the amendatory Act Congress intended that the evil of the first Act should be remedied and that its benefits should be retained. Undoubtedly Congress, in its wisdom, saw immediately that the first Act would in effect

relieve such persons as this defendant of the consequences of their depredations upon the public domain, and without delay corrected the error by the passage of the amendatory Act.

The opening paragraph of the amendatory Act recites: “‘An Act to repeal timber culture laws, and for other purposes,’ approved March 3, 1891,” etc., which clearly indicates that Congress recognized that the first Act had already been passed and had become effective prior to the passage of the amendatory Act. This same view of the situation was taken by the Supreme Court of the United States in *Northern Pacific R. Co. vs. Lewis*, 162 U. S. 366; 40 L. Ed. 1002-1007, where the Court said:

“Nor did the plaintiffs obtain any rights under Section 8 of the laws of Congress approved March 3, 1891, entitled ‘An Act to repeal timber culture laws, and for other purposes,’ 26 Stat. at L. 1099. That section was amended by the Act approved on the same day, March 3, 1891, 26 Stat. at L. 1093.”

Further support of our contention that the amendatory Act is now in effect is found in the fact that immediately after its passage and the promulgation of regulations by the Secretary, the Black-foot Milling and Manufacturing Company applied for the permit involved in this suit, which was granted by the Secretary of the Interior, and the specific lands therein described and the regulations set forth, all in accordance with the amendatory Act.

Even if the first Act of March 3, 1891, was in



effect for any period of time whatever, it does not bar this action by the Government. The first Act, if in existence, only gave to persons situated like the defendant the right to interpose a specific plea in bar of the action commenced. It did not in specific terms wipe out and condone the offense committed. It therefore follows that if the first Act was in existence for any time during such period, the defendant only had the right to interpose such a plea, and after the amendatory Act was passed, this right to interpose such plea was taken away and defendant was possessed of only such rights as the amendatory Act gave him. The amendatory Act provides that it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and had not been transported out of the state or territory. The record in this case is absolutely silent as to any compliance with any rules or regulations in the cutting and removing of any of the timber in the Blackfoot country except the timber which was cut from the north half of the southwest quarter of Sections 18, 14, 15, under the permit granted the Big Blackfoot Milling Company as successor in interest of the Blackfoot Milling and Manufacturing Company. It is true that there was considerable testimony offered with respect to compliance with rules and regulations promulgated by the Secretary in the cutting of the timber from the

Hellgate lands. In respect to the cutting from the Blackfoot River lands, there was no evidence whatever to show that the defendant or any of the persons or corporations associated with him in the trespass, complied with any rule or regulation whatever. It has been repeatedly held by the Courts that the right to cut timber from the public domain is exceptional, quite narrow and for specified purposes only, that the presumption in the absence of evidence is that the cutting is illegal, and in order for a person to bring himself within the right, he must show strict compliance with the statute. (*U. S. vs. Cooke*, 86 U. S. 19 Wall. 591; 22 L. Ed. 210; *Northern Pacific R. Co. vs. Lewis*, 162 U. S. 366; 40 L. Ed. 1002-1006).

### III. THE MEASURE OF DAMAGES.

#### A. The Court's Instructions.

##### 1. The instruction setting forth the measure of damages applicable as for a wilful conversion.

In instructing the jury with respect to the amount of their verdict in the event they found the defendant was liable as a wilful trespasser, the Court said:

“If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.”

**2. The instruction setting forth the measure of damages applicable as for an innocent conversion.**

With respect to this phase of the case, the Court instructed the jury as follows:

“If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.”

**B. The defendant's exception to the instructions.**

The record does not disclose that the defendant made more than one exception to the instructions given by the Court. The Court gave two instructions—one which set forth the measure of damages in the event the jury determined that the conversion was wilful, and the other in the event that the jury determined that the conversion was innocent. It is to be noted that the objectionable portion of the instruction given upon the hypothesis that the conversion was innocent contains two elements, if it is objectionable at all. The first part of the instruc-

tion follows exactly the language of the Supreme Court in the case of *Bolles Woodenware Co. vs. United States*, 106 U. S. 432; 27 L. Ed. 230. And the only objectionable feature that can be possibly imputed to this instruction is the latter portion of it where the Trial Court added the following: "In other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

If the contention made by the defendant be correct, then the part of the instruction which was added by the Trial Court contains an entirely different element from that portion of the instruction quoted from the *Woodenware* case. If it does not, as we contend, and as the Court below thought, then the instruction as a whole is entirely in accord with the rule laid down in the *Woodenware* case. It is only upon the theory that this instruction contains conflicting elements or statements of the rule that the defendant can predicate any error. The rule in the *Woodenware* case has been repeatedly upheld and cited by the Courts as being the true rule in cases of conversion. The objection interposed by the defendant to the instructions given by the Court on the measure of damages is as follows (Tr. p. 780):



“Mr. Wheeler. Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your Honor’s instructions add to it another element.”

The exception as thus made lacks certainty and direction in many respects. The language used shows clearly that counsel had in mind at that time both the instructions with respect to the measure of damages for a wilful conversion and for an innocent conversion, for he uses the term in the plural, i. e., “instructions.” He does not point out to the Court specifically whether he means that he excepted to the instruction given on the hypothesis that the conversion was wilful or the one relating to an innocent conversion. The only portion of the exception which might avail counsel in their present contention is where they said that “the only measure that can exist under the circumstances is the value of the stumpage in the tree.” The instruction given by the Court with respect to a wilful conversion told the jury that if they should find the conversion was wilful, they should return a verdict for the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale. This instruction clearly indicated to the jury that they should return, in the event they believed the conversion wilful, a verdict that embraced more than the value of the stumpage. The instruction with respect to an innocent conversion,

if considered as being in accord with the Woodenware case, is only another method of arriving at the stumpage value of the timber converted. In order that counsels' argument may have any force, they must assume that the latter portion of this instruction gave the profit derived from the conversion of the timber to the Government instead of to the defendant, and certainly they do not specifically point out by this exception which portion of the instruction was objectionable to them.

Counsel did not request the Court to give any instruction whatever as to the measure of damages. It is well settled in cases of trover and conversion that the burden is upon the defendant to show all facts which he claims will mitigate the damages. It is customary in such cases for the plaintiff to ask judgment for the highest market price of the property in whatever condition it may have been at the time of its disposal or sale by the defendant, and in order to reduce this highest measure of damages, the burden is upon the defendant to show those circumstances which will mitigate his offense. (*United States vs. Murphy*, 32 Fed. 378; *Trustees of Dartmouth College vs. International Paper Co.*, 132 Fed. 92; *United States vs. Gentry*, 119 Fed. 70; *Northern Pacific Co. vs. Lewis*, 162 U. S. 365; *United States vs. Cook*, 19 Wall. 591; *United States vs. Eccles*, 111 Fed. 490).

In the case at bar, although this burden was upon them and although their whole case was tried upon

the theory that defendant was entitled to the benefit of mitigating circumstances, counsel refused to ask any instructions of the Court upon either phase of the measure of damages. The Courts have universally held that such a practice by counsel is to be condemned, and they cannot avail themselves of such exceptions after they have declined to aid the Court in rightfully instructing the jury. It therefore follows that this exception was indefinite, uncertain and vague in that it did not tell the Trial Court whether it excepted to the instruction on the measure of damages in case the conversion was wilful, whether or not it referred to the first portion of the instruction relating to an innocent conversion, or whether it referred to the portion of the instruction which they now say gave to the Government whatever profit may have been derived from the conversion, manufacturing and sale of the timber in question.

On page 209 of part 2 of the defendant's brief, counsel say: "Before examining the decisions on this subject we would suggest to the Court, as we have already noted, there was nothing in the complaint or on the trial to indicate that there would be any attempt to depart from the well settled rule as to the measure of damages for the innocent conversion of standing timber. We had supposed the rule so well settled that we did not request any instruction in the premises. The instruction came as a surprise to us, and under the circumstances we submit we did all that could be reasonably expected.

On the other hand, the Court had the instructions requested by our side before it for many days and presumably had given mature consideration to that which it finally gave on this subject."

This statement by counsel is wholly unsupported by the record. The complaint (Tr. p. 4) very clearly indicates that the pleader had in mind such an instruction, for the value of the property, as it existed in its several conditions, is expressly set forth. It is stated that while standing in the tree, it was worth \$1 per thousand; after being felled and prepared for sawing into lumber, \$5 per thousand; and after being manufactured into lumber, \$10 per thousand. This clearly indicates an intention to arrive at the value by the method indicated by the Court's instruction. The burden was upon the defendant, as we have already shown, to plead and prove the circumstances which would mitigate the damages, and it was certainly the duty of counsel to present to the Court an instruction with respect to the measure of damages in the event the jury believed their plea of good faith and lack of intention to convert the timber in question. Their failure to do so is so manifestly unjust and unfair to the Trial Court that we believe the cases referred to in the opinion of the Trial Court on the motion for a new trial, and those hereinafter cited, make it incumbent upon this Court to refuse to consider the exception taken to these instructions even though such instructions be manifestly erroneous.

Attention is further invited to the fact that the



exception taken by counsel is insufficient in view of the instructions given, because the instructions on the measure of damages with respect to wilful conversion included more than the stumpage value of the timber. It is not unreasonable to say that this language shows that counsel believed that the evidence was sufficient for the Court to declare peremptorily that the Government had failed to make out a case of wilful conversion, and that all that it could recover was as for an innocent conversion.

Counsel for the defendant wholly misconceive the rule which has been laid down with respect to the certainty of exceptions. In the opinion rendered by Judge Van Fleet on the motion for a new trial, he cites the following cases: *McDermott vs. Severe*, 202 U. S. 600-610; *Mobile Etc. Co. vs. Jurey*, 111 U. S. 584-596; *Montana Mining Co. vs. St. Louis M. & M. Co.*, 147 Fed. 897-909; *Butte Etc. Mining Co. vs. Montana Etc. Mining Co.*, 121 Fed. 524-528; *Springer Etc. Co. vs. Falk*, 59 Fed. 707; *Stewart vs. Morris*, 96 Fed. 703; *Porter vs. Buckley*, 147 Fed. 140; *Coney Island Co. vs. Denman*, 149 Fed. 687; *Central Etc. R. R. Co. vs. Mansfield*, 169 Fed. 614; *Beisecker vs. Moore*, 174 Fed. 368.

In all of these cases, and those hereinafter quoted from, the instructions of the Court to which exceptions had been taken contained more than one element or rule of damages, and the Appellate Courts held that a general exception to a charge containing more than one element was not sufficient to advise

the Trial Court of the specific element of the charge which was deemed objectionable. Counsel do not seem to be able to make this distinction in their argument, for all of the cases cited by them in support of their position are cases where the charge to the jury referred to but one element of damages. In the case at bar we have already pointed out that the charge given by the Court referred to the measure of damages applicable in the event the jury found the defendant was liable as for a wilful conversion, and that according to counsels' own argument, the instruction with respect to an innocent conversion contained two different and conflicting elements, one concededly correct under the doctrine of the *Woodenware* case, and the other now objectionable to counsel for the defendant. We thus have in the case at bar instructions on the measure of damages containing three separate and distinct elements and no definite or certain declaration by counsel as to which of these elements was erroneous. We earnestly insist that this conduct on the part of counsel was unfair to the Court and their concealment of their objection in this manner should not avail them in this Court. We submit that the decision of the Trial Court on this point is in full accord with the rule adopted by all Appellate Courts.

In *McDermott vs. Severe*, 202 U. S. 600-610, discussing an exception to the charge of the Court on the question of damages *where as here the charge involved several distinct elements*, it is said:

“The Court’s attention was not called to any

particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the Court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specially the part of the instruction regarded as erroneous. *Baltimore & P. R. Co. vs. Mackey*, 157 U. S. 72-86; 39 L. Ed. 624-629; 15 Sup. Ct. Rep. 491. \* \* \* It would be very unfair to the Trial Court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal."

And again in *Mobile Etc. Co. vs. Jurey*, 111 U. S. 584-596, *where the charge embraced two several elements*, and the exception failed to specify as to which it was intended to apply, it is said:

"Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: First, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8 per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have been

pointed out to the Court the precise part of the charge that was objected to. 'The rule is, that the matter of exception should be so brought to the attention of the Court before the retirement of the jury to make up their verdict, as to enable the judge to correct any error, if there be any, in his instructions to them.' *Jacobson vs. State*, 55 Ala. 151.

'When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the Court to the precise point of objection.' *R. R. Co. vs. Jones*, 56 Ala. 507.

"So in *Lincoln vs. Claflin*, 7 Wall. 132, this Court said: 'It is possible the Court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. \* \* \* But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. \* \* \* It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct.' On these authorities we are of the opinion that the ground of error under consideration was not well saved by the bill of exceptions."

In the case of the *United States vs. The U. S. Fidelity & Guaranty Company, et al.* (236 U. S. 512), the Court said:

"The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be



obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. *Beaver vs. Taylor*, 93 U. S. 46-55; *Robinson & Co. vs. Belt*, 187 U. S. 41-50; *Addis vs. Rushmore*, 74 N. J. L. 649-651; *Holt vs. United Security Life Ins. Co.*, 76 N. J. L. 585-593. And the practice respecting exceptions in the Federal courts is unaffected by the Conformity Act, Sec. 914, Rev. Stat. Chateaugay Iron Company, Petitioner, 128 U. S. 544-553; *St. Clair vs. United States*, 154 U. S. 134-153."

In the recent case of *Illinois Central R. R. Co. vs. Skaggs* (194—Oct. Term, 1915. Decided, Jan. 31, 1916), the Court said:

"If the plaintiff in error desired any addition, amplification or qualification in order to present its point of view to the jury, it should have made appropriate request therefor. The record does not show that the plaintiff in error either objected at the time to any statement made by the Court to the jury or that it made any request whatever for instructions. While under the local statute (General Statutes, Minnesota, Sec. 7830), the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the Trial Court, *we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of a failure on the part of the Trial Court particularly to specify in its charge some matter to which its attention had not been suitably called.* *State vs. Zempel*, 103 Minn. 428-429; *Waligora vs. St. Paul Foundry Co.*, 107 Minn. 554-559; *Sassen vs. Haegle*, 125 Minn. 441; *State vs.*

*Sailor*, 153 N. W. Rep. (Minn.), 271; *Smith vs. Great Northern Rwy. Co.*, 153 N. W. Rep. (Minn.), 513. This, also, is a sufficient answer to the complaint of the failure of the Trial Court to charge the jury with respect to assumption of risk. There was no request for any instruction upon this point.” (Italics supplied.)

In the case of *William Sebald Brewing Co. vs. Tompkins*, 221 Fed. 895, the Court, on pages 899-900, said:

“The third and fifth assignments challenge the charge of the Court, touching: (a) the question of the defendant’s negligence; and (b) the plaintiff’s contributory negligence. The record discloses the following: ‘Mr. Strong: I desire also to except to your Honor’s charge upon the question of negligence and contributory negligence.’ We are inclined to the opinion that the exception on which these assignments are based is too general (rule 11 of this Court [193 Fed. vii, 112 C. C. A. vii]) to support the assignments.”

Counsel for defendant tacitly concede that the Court correctly instructed the jury as to the measure of damages applicable for a wilful conversion. Their only objection goes to the instruction given as to the measure of damages for an innocent conversion. The Courts have uniformly held that a general exception to a charge to a jury is not available if any part of the charge is correct. We invite attention to the case of *Moore vs. Bank of the Metropolis*, 13 Pet. 302, 10 L. Ed. 172-173, and note.

**C. The instruction on the measure of damages in case the conversion was innocent was not erroneous.**

**1. The rights of the United States are governed by the rules adopted by the Federal Courts.**

It is difficult to determine the position taken by counsel for the defendant with respect to the question as to whether the rights of the United States with respect to this property that has been converted, will in any manner be governed by the laws of the several States. After carefully reading that portion of their brief on this question, we conclude that they make no serious contention that the Trial Court should have followed the rule adopted by the State of Montana. This question has not been clearly and definitely determined by the Courts. We believe the cases of the *United States vs. Bean*, 120 Fed. 719, and the *United States vs. Thompson*, 98 U. S. 488, sufficiently indicate a determination on the part of the Federal Courts to disregard State statutes which may affect the rights of the United States with respect to its property. In none of the cases decided and reported by the Federal Courts is there any indication of an intention on the part of the Courts to follow the measure of damages adopted by the several States, or to give them any weight where the rights of the United States are concerned. The whole trend of decisions on this point is to the effect that the Federal Courts will adopt their own rules in respect to such property and rights. It is well established that Congress is the only power which can deal with the property of the United

States and provide for its disposal, and that State statutes cannot affect the right of Congress in any respect. The Federal Courts have adopted rules of their own irrespective of the State laws, and apparently Congress has contented itself with this method of procedure. It would therefore seem to be a settled question that the rights of the Government in this case must be measured by the rules adopted by the Federal Courts. For a full discussion of the rights of Congress, and impliedly the rights of the Federal Courts, to deal with the property of the United States, we invite attention to the case of *Light vs. The United States*, 220 U. S. 523, and particularly the brief of counsel for the government, 55 L. Ed. 570-573.

## **2. The instruction was not erroneous.**

It is indeed difficult to determine what rule of damages will apply in cases of innocent conversion. A careful consideration of all the cases, both in the Federal and State reports, shows that there is a lack of uniformity and that it has apparently been the intention of the Courts to frame a measure of damages applicable to each case. It is true that through all of the decisions certain fundamental principles seem to be carried, but each case and its peculiar facts have required that the instructions given to the jury should be based upon those facts rather than upon some established rule. In the language of Judge Lowell in the case of *Trustee of Dartmouth College vs. The International Paper Co.*,



*supra*: “some of these rules seem to have been adopted as rough and ready measures of convenience, some without recognition of the difference between them.” These different rules undoubtedly arise from the fact that although a trespass may be innocent and committed in ignorance, yet there is a measure of negligence inherent in every conversion. This negligence varies with the facts in every case, and it is unreasonable to say that any hard and fast rule applicable to all degrees of negligence can be adopted by the Courts. Counsel for the defendant rely largely upon the case of the *United States vs. St. Anthony R. R. Co.*, 192 U. S. 524, where it is said: “We think the measure of damages should be the value of the timber after it was cut at the place where it was cut.” This rule is wholly inconsistent with the rule adopted by the Court in *Woodenware Co. vs. The United States*, 106 U. S. 432, and likewise the language of the Court in *Pine River Logging Co. vs. The United States*, 186 U. S. 279, and other cases cited; but it is to be noted that the case at bar differs widely from these cases with respect to the facts and to the degree of negligence attributable to the defendant. The cases cited are each instances where one specific act of conversion was charged. In the case at bar, the testimony discloses that the conversion was a series of acts covering a wide period of time and under a diversity of circumstances. In the cases referred to, it is not apparent that the defendants were engaged in wholesale depredations upon the public domain and were

not engaged in cutting and removing timber from public lands as a business for profit, but were merely charged with conversion of specific and definite quantities of timber which apparently were taken for the personal use of the defendants. In this case, we have an entirely different situation. The defendant and his personal and corporate associates were dealing fast and loose with the timber on the public domain. They were not taking this timber for the purpose of improving some property of their own or applying it to their own specific needs, but were cutting and removing it for sale in their general course of business, and it is not harsh or unjust under the circumstances for a Court to say that this defendant, although he may be technically innocent, has exhibited such a degree of negligence and has shown such a disregard of the rights of the Government as not to render him entitled to any of the profits derived from the cutting and manufacturing and sale of the timber in question. We say this without conceding that the language of the Court's instruction may be interpreted to mean what counsel for the defendant say it means, but we advance this argument for the purpose of showing that the defendant is not strictly within the rule laid down by cases upon which counsel rely. It is to be noted also that in the cases of *United States vs. St. Anthony R. R. Co.* and *Pine River Logging Co. vs. The United States*, and the other cases cited and relied upon by counsel, the Courts did not have under consideration the element which

they have attempted to read into the Court's construction in this case. In these cases, the principal question that was determined was not that such an instruction as the one in this case was erroneous, but whether the defendant there charged was an innocent or a wilful trespasser; and we submit that the language of the Court in determining the wilfulness or innocence of the defendant is utterly irrelevant to the question as to what measure of damages is applicable as for an innocent conversion.

In cases of trover and conversion, the actions are not always brought upon the same theory. This is largely due to the fact that the subject of the action is personal property which may undergo changes. It is undoubtedly true that a plaintiff is entitled to the possession of the property at all times before the commencement of his action. He may, if he chooses, demand possession immediately after it is seized by the wrongdoer. He may not have knowledge of the conversion at that time and may make his demand for the property after it has been improved and changed. The Courts have uniformly held that the plaintiff may charge the conversion as at any date prior to the bringing of the action, and in attempting to fix the measure of damages, the Courts will take into consideration the status of the property at the time of the commencement of the action (see *Trustees of Dartmouth College vs. The International Paper Co.*, *supra*); and we do not believe that the cases cited by the plaintiff in error indicate any intention on the part of the

Supreme Court to lay down the rule that in all cases, the value at the time of first taking must govern. Clearly the Supreme Court had no such intention in the *Woodenware* case, and in the subsequent cases there is no expressed intention to overrule that case. We insist that the language of the *Woodenware* case fully contemplates such a situation and that the Court had in mind, when rendering its decision, that cases such as the one at bar might arise in the future. The instruction given by the Court follows closely the language of the *Woodenware* case, and without some manifest intention of the Supreme Court to overrule this language, we do not believe under all the circumstances in this case that this Court should say that the Trial Court made an error in this instruction. It is very clear that the first part of the instruction given was proper, and it is only by interpretation of counsel that the instruction can be said to depart from the doctrine laid down in the *Woodenware* case.

However, counsel dwell at length upon the second part of this instruction and insist that it is erroneous and without support by any decision of the State or Federal Courts. The language used in this part of the instruction finds support in the case of *Winchester vs. Craig*, 33 Mich. 205, which is relied upon and cited by the Supreme Court in the *Woodenware* case. Counsel for the defendant say that the case of *Winchester vs. Craig*, *supra*, was overruled on June 10th, 1885, by the Supreme Court of Michigan in *Ayers vs. Hubbard*, 23 N. W. 829; but in this



latter case, the Court did not have before it the same instruction that was before the Court in *Winchester vs. Craig*. It would seem that the question determined in *Ayres vs. Hubbard* was not as to the measure of damages applicable to an innocent conversion, but was a question as to whether or not the defendant was a wilful or an innocent trespasser. This case is merely another instance of the fact we have already adverted to that the Courts, in cases of conversion, have not followed any fixed measure of damages, but have apparently applied such rule as they thought the facts in each case warranted. It is to be noted that in all of the cases cited by counsel for the defendant, the particular language upon which they rely for support is applicable to the facts then before the Court, and in none of them was the situation the same as in the case at bar. In none of them did the plaintiff seek to measure the liability of the defendant by deducting from the market value of the manufactured product the actual expense of improvement. Because these cases were cast upon a different theory, it is not conclusive that the language of the Courts is in effect a declaration that the principle involved in the instruction under consideration is erroneous.

In the case of *Vance vs. W. A. Vandercook Co.* [No. 2] 170 U. S. 468, 42 L. Ed. 1111, Mr. Justice White, now Chief Justice, reviews at length the question of the measure of damages for the conversion of property, and we submit that this case on the whole supports the contention made by the Government in

the case at bar, that the measure of damages recoverable is not always limited to the value of the property in the condition it was at the time of the taking. The authorities there reviewed show that the damages allowable may be based upon the value of the property at a date subsequent to its conversion.

In the case of *Tome vs. Dubois*, 6 Wall. 548, 18 L. Ed. 943, the Supreme Court of the United States approved an instruction which permitted the plaintiff to recover the manufactured value of certain timber less the cost of saving the logs and sawing them into lumber.

In the case of *Trustees of Dartmouth College vs. The International Paper Co.*, 132 Fed. 92, the Court said:

“Unfortunately, the precise measure of the allowance to the defendant for his improvements has been stated by different Courts—or by the same Court—in many ways. *In theory, the allowance should equal the cost of the defendant’s improvements, not to exceed the consequent enhancement of value in the property converted.*” (Italics supplied.)

In the case of *Herdic vs. Young*, 55 Pa. St. 176, 93 Amer. Dec. 739, the Court on pages 742-743, after determining that the rule of damages is the same in trespass and conversions as in replevin, said:

“If he claim the additional value, it is always his right to retain the property by giving a property bond; and the effect of a verdict for

damages in favor of the plaintiff is to transfer the title to the defendant. If, therefore, he denies that his trespass was wilful or wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass, or one done under a *bona fide* but mistaken belief of right, this would generally be the value of the logs at the boom (the place here of replevy), less the cost of cutting, hauling and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable, and does justice to both parties. *It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, or other adventitious causes.* These principles are recognized fully by Mr. Sedgwick in his valuable treatise on damages, ed. 1852: 'That the intent of the defendant is material in regard to damages, has always been recognized in our law': p. 455. 'The question of intention is urged only in mitigation or aggravation of damages': Id. 455, 528. On page 495, he says: 'If the property had been altered and increased in value, the rule would again depend on the character of the conversion. If that were wilful, then the value of the articles so increased would be the rule. But this should never be where the act was *bona fide*; and in such case, the true rule would be to allow the defendant for whatever value his labor had actually conferred upon the property': see also Id. 501. The Court below erred, therefore, in rejecting the plaintiffs' evidence of the

value of the logs in the boom; the evidence being received, the defendants would be left to rebut it, if their trespass was unintentional, by showing how much it cost to cut and haul the logs and drive them to the boom." (*Italics supplied.*)

This case is also interesting because it declares, as we have hereinbefore attempted to indicate to this Court, that in fixing the measure of damages, even in cases of innocent conversion, the Court will be largely influenced by the specific facts in the case under consideration.

On page 190, part 2, of their brief, counsel for defendant say: "With the overruled *dictum* of an early Michigan case as the only precedent to support the instruction given by the Trial Court, we naturally expect the proposition to be advanced that if the wrongdoer is credited with the cost of manufacture, he would not object to pay stumpage value plus the profits made, if any, in his wrongful enterprise." They thus say that we are supported by mere *dictum* in a case already overruled. This contention is refuted by the decision of the Supreme Court of the State of Michigan in *Anderson vs. Besser*, 91 N. W. 737, which was rendered September 30th, 1902, seventeen years after the decision in *Ayres vs. Hubbard*, *supra*, which counsel say overruled *Winchester vs. Craig*.

In *Anderson vs. Besser*, the Court said:

"The next question relates to the measure of damages. Plaintiff now seeks to obtain the value of the timber at the railroad, without any deduction for cost of cutting and removing it



to the railroad. Upon the trial, he requested the Court to instruct the jury as follows: 'If you find that the defendant cut the timber thinking in good faith that he owned the timber through his tax titles, then the fair measure of damages would be the market value of the logs at the point where they were sold by the defendant, less the amount paid by Mr. Besser to put them on the track, with interest from the date they were placed on the railroad track until the present time. In determining the market value of the logs at the track, the amount for which the defendant sold the logs, of which the timber from the land in question formed a part, should be considered by you.' This request was given, with the modification that they should 'deduct what it was fairly worth, or what it would fairly cost, to put the logs upon the track.' In closing his instructions, the Court said: *'But, to sum it all up, you should give the plaintiff, if you find that the defendant, as I have instructed you, acted in good faith in this matter, under his tax titles, all that the timber was fairly worth on the stump, on the land in question, together with such profit as he might have made in removing it to the place where it was landed, and then sold at the fair market value for the logs at that place.'* Four actions were open to plaintiff: (1) Trespass *quare clausum fregit*; (2) replevin; (3) assumpsit, under Section 11,207, Comp. Laws; (4) trover. In an action of trespass, he would recover all damages to the freehold, including the value of the timber removed. In replevin, he would recover the property in its changed state, unless the defendant had obtained title by accession under the rule of *Wetherbee vs. Green*, 22 Mich. 311, 7 Am. Rep. 653. In an action of assumpsit, he would recover the value of the timber, but upon what basis such value should be determined seems never to have been

before the Court, and we refrain from expressing an opinion. By bringing an action of trover, these other remedies are waived, and the rule of damages in trover must apply. The general rule in trover is that the plaintiff is entitled to recover the value of the property converted. Difficulties in applying this rule have arisen where the defendant has added to the value of the property converted by his own labor and expense, and where he has obtained possession by fraud or wilful wrong, and where his acts were casual and involuntary. The decisions upon the measure of damages where trespasses have been committed, and timber, coal, and other materials have been severed from the realty and converted, are not harmonious, and cannot be reconciled. Where the trespass was not intentional, and the manufactured property is worth 27 times the standing timber, the unintentional trespasser obtains title by accession. *Wetherbee vs. Green*, *supra*; *Carpenter vs. Lingenfelter*, 32 L. R. A. 422, and note (s. c. 42 Neb. 728, 60 N. W. 1022). In applying this doctrine, the facts in each particular case must govern. See *Mining Co. vs. Hertin*, 37 Mich. 332, 26 Am. Rep. 520, where it was held that the property was not so increased in value in its changed states as to justify the application of the rule of title by accession. Plaintiff relies upon *Grant vs. Smith*, 26 Mich. 201. The reasoning of that case is not easily reconcilable with *Winchester vs. Craig*, *supra*, decided four years later. Three of the justices who decided *Grant vs. Smith* also participated in the decision in *Winchester vs. Craig*, and two of them approved the opinion. It was there held, in an exhaustive opinion, that, in the absence of fraud, violence, or wilful negligence or wrong, the proper measure of damages, as a general rule, in trover, is such sum as will afford compensation for the actual

injury sustained. The rule in *Grant vs. Smith* would apply in cases of wilful trespasses, and the opinion in *Winchester vs. Craig* in effect so holds, for it says that, with the tax deed rejected, there was nothing tending to show that defendant acted other than as a wilful trespasser. *Winchester vs. Craig* has been frequently cited with approval by this and other Courts, and states the rule which is sustained by the clear weight of authority. It is cited in *Bolles Woodenware Co. vs. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, where the rule for assessing damages in such cases is held to be: (1) Where plaintiff is a wilful trespasser, the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense; (2) where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value; (3) where he is a purchaser, without notice of wrong, from a wilful trespasser, the value at the time of such purchase. See, also, *Ayres vs. Hubbard*, 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361, Id. 71 Mich. 594, 40 N. W. 10; *Gates vs. Boom Co.*, 70 Mich. 311, 38 N. W. 245; *Bailey vs. Railroad Co.* (S. D.) 19 L. R. A. 653, and note (s. c. 54 N. W. 596); *Whiting vs. Adams*, 66 Vt. 679, 30 Atl. 32, 25 L. R. A. 598, 44 Am. St. Rep. 875." (Italics supplied.)

This case is likewise important in that it holds that "in applying this doctrine, the facts in each particular case must govern," and also that *Winchester vs. Craig* has been frequently cited with approval by the Courts of the State of Michigan and other Courts.

Attention is invited to the following cases which

announce the same doctrine as the common law rule, to wit:

*Heard vs. James*, 49 Miss. 236;

*Baker vs. Wheeler*, 8 Wendell 505;

*Baldwin vs. Porter*, 12 Conn. 484;

*Brizsee et al. vs. Maybee*, 21 Wendell 144.

On pages 178-179 of their brief, counsel for the defendant cite a recent decision of the Department of the Interior, Vol. 40, pages 518-525, with respect to the measure of damages in cases of innocent trespass. It is to be noted that the decision referred to is predicated upon an offer of compromise made by the trespasser in which he tenders to the Government the value of the timber after severed. It is likewise an instance where the trespasser was not engaged in continual depredations upon the public domain, but was clearly and honestly an unintentional trespasser. Counsel quote a portion of the decision which is found on page 525. In the paragraph just prior to the quotation, the Secretary considers the case of *Woodenware Co. vs. The United States*, *supra*, and the language employed clearly indicates that he was of the opinion that the *Woodenware* case decided that the deduction allowable to an innocent trespasser from the market value of the improved property, was merely the cost of the labor or improvement added to the property after it was finally severed from the soil and removed from the premises where cut. In sustaining the position taken, this decision refers to the case of *Wright vs. Skinner*, 34 Fla. 453, 16 So. 335, which



case also refers to the Woodenware case, and the quotation found on 524 of the Secretary's opinion indicates that the Supreme Court of Florida considered that the Woodenware case allowed only for the cost of any labor bestowed upon the property after the conversion was consummated by actual removal from the owner's land.

We therefore submit that the instruction given by the Court in this case was proper, and that the defendant is not entitled to urge his objection to it in this Court because of his failure to point out specifically the error he complains of.

#### **IV. INTEREST.**

##### **A. The instructions given by the Court and the exception thereto.**

The Court instructed the jury (Tr. p. 770) as follows:

“In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.”

At the close of the Court's instructions, the following colloquy between the Court and counsel occurred (Tr. p. 776):

“Have counsel any suggestions to make?

Mr. Hall: I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court.

The Court: The rate of interest is the legal rate of 7%.”

In saving their exception to the Court's instruction, counsel said (Tr. p. 780):

“I also except to your honor's instructions with regard to interest.”

The principal objection now urged against this instruction is that the Government was not entitled to recover any interest whatever upon the value of the timber found by the jury to have been converted. It is the contention of the Government that the instruction is entirely proper, and it would seem from the authorities cited by counsel for defendant that they have come to the conclusion that the question of interest was wholly within the discretion of the jury. They seek now to excuse themselves for not properly informing the Court at the trial of the true rule with regard to interest by saying that the interest was not prayed for until the amendment was made to the complaint at the close of the evidence. The record discloses that between the time of the amendment and the instructions of the Court, some two or three days were consumed in argument, and this was certainly sufficient time for such eminent counsel as appear for the defendant to investigate and determine in their own minds the true rule as to interest. We do not doubt that if they had intended to be fair with the Court and to present their theories fully and completely in order that the Court might know their contentions, there was sufficient time for them to have presented to the Court either an instruction denying interest entirely or submitting the question to the jury. They did not see fit to tell the Court of their position nor did they attempt

to say anything upon the question as to what rate of interest the jury should allow. The exception they made did not indicate to the Court which phase of the instruction, or the so-called error, they were complaining about, and it is not now for them to say that they had in mind the fact that no interest at all should be allowed. In passing upon the motion for a new trial (*United States vs. Hammond*, 226 Fed. 849), the Court said:

“It is obvious, I think, that this exception is insufficient within the principles of the cases above stated and particularly *Mobile, etc. vs. Jurey, supra*, the latter case being precisely opposite in the nature of the question involved. As in that case, the charge here embraces two distinct propositions on the subject to which it relates. First, the right of the plaintiff to interest, and, second, the rate by which it is to be estimated. The criticism now made is, not that plaintiff was entitled to interest in no event, but that its allowance should, under the circumstances, have been left to the discretionary judgment of the jury. But manifestly the language of the exception is not of a nature to convey any such significance to the mind of the Court, nor indicate whether the objection was aimed at the direction to award interest or to the specification of the rate at which the jury should compute it. Had the Court’s attention been arrested to the objection now urged, it would have been a very easy matter to modify its language to avoid the criticism, had it been deemed correctly founded; but although the prayer of the bill was amended at the trial to include the demand for interest and plaintiff’s requested instructions included one for its allowance, those of defendant were silent on the subject and the charge was framed upon the

assumption by the Court that its allowance was a matter of right. Moreover, the specification of the rate of interest, having been inadvertently omitted from the charge, was added by the Court at the suggestion of counsel for the Government before the jury retired, and neither then nor thereafter in taking his exceptions did defendant suggest any objection to the direction on the subject other than the general exception above noted. Under the circumstances, I think the assertion of the objection now made must be held as unavailing.

“In view of this conclusion, it would subserve no useful purpose to discuss definitely the question strongly mooted between counsel, whether the objection now urged, if properly raised, would be well taken. It may be suggested that while the question seems left in some doubt and difference in the Federal Courts whether interest in the absence of statutory sanction is allowable as a matter of right, the rule of the charge is the generally prevailing one (Sedgwick’s *Elements of Damages*, p. 137, 2nd Ed.; 1 *Sedgwick on Damages*, 631; *Joyce on Damages*, Vol. 2, p. 1261, par. 1105; *Sutherland on Damages*, Vol. 2, p. 969, par. 355) and is that prescribed by statute in this and most of the other States. These suggestions are made merely to illustrate that the question in controversy is a close one, and the case, therefore, essentially one where the exception should have been such as to specifically direct the attention of the Court to the precise objection intended to be raised.”

**B. Interest should be allowed on the value of property converted.**

**1. The authorities cited by the defendant.**

Counsel, in support of their argument that the



Court erred in its instructions in respect to interest, rely upon *United States vs. St. Anthony R. R. Co.*, 192 U. S. 543, 48 L. Ed. 548. They urge that this case is authority for their contention because the Court, in reversing the case and giving directions for the rendition of judgment by the Lower Court, did not specifically say that the judgment should include interest on the value of the property converted. An examination of the reported case fails to reveal that the question of interest was presented to or considered by the Court. Even in the brief of counsel appended to the reported case, there is nothing indicating that this question was under consideration, and, as we have pointed out before, the portion of the opinion quoted by counsel for the defendant on page 196 of their brief, was not in reality the question under discussion. While the second syllabus would seem to indicate that the Court was really considering the measure of damages, the body of the opinion shows that the real question was whether or not the St. Anthony R. R. Co., having acted upon the advice of counsel, was liable as a wilful or an innocent trespasser. There was but one other point discussed in the case, namely, that of adjacency, and this was in fact the principal contention between the parties and the principal point decided by the Court. The Supreme Court was not asked to pass upon the question of interest, and from the record it is apparent that the question was never considered by either side. We do not believe that the Court's silence on a question not raised is any authority in support of the argument here advanced.

Great weight is given to the case of *White vs. United States*, 202 Fed. 501, where the Court required the United States to enter a *remittitur* before it would affirm the judgment. An examination of this case shows that the allowance of interest by the jury was entirely without instruction from the Court and apparently upon the jury's own volition. The facts of the case show that the jury returned a verdict based upon the highest market value of the lumber converted between the time of conversion and the time of the trial. This highest market value was not as of the date of the conversion, but as of a date long subsequent thereto. The jury did not compute the interest from the date of the market price fixed and accepted by them, but gave interest from the date of conversion. Such action is wholly inconsistent because if the defendant was liable for the highest market price, which was greater than at the date of conversion, it would be unjust and inequitable to compel the defendant to pay interest for a period of time anterior to the date on which such market price actually existed.

The case of *Eddy vs. Lafayette*, 163 U. S. 456-467, 41 L. Ed. 225, is distinguishable from this case because that action was not an action for the conversion of personal property. It was a case where an individual sought to recover damages from the receivers of a railroad company for the destruction of personal property. There was nothing showing that the railroad company had benefited by its tort, while in the case of conversion of personal prop-

erty, interest is allowed upon the theory that the estate of the tortfeasor has been enriched, and that between the time of conversion and the rendition of judgment, he has had the use and benefit of the property converted. In cases of negligent destruction of property, the tortfeasor derives no benefit from his wrongful act, whereas in cases of conversion, like cases of unlawful detention of money, the wrongdoer is presumed not to have wrapt the talents in a napkin, but to have put them out at interest or otherwise employed them in his business affairs so that he has derived a benefit therefrom. Careful examination of the case of *Eddy vs. Lafayette*, *supra*, would seem to indicate that the Appellate Courts will not disturb the verdict of a jury even though an erroneous instruction was given with respect to interest, unless it clearly and conclusively appears that the jury did include interest. Counsel for defendant have attempted to demonstrate that the verdict in this case is largely made up of interest, but we shall treat that question separately and demonstrate the fallacy of their argument and the error of their conclusion.

The case of *Lincoln vs. Claflin*, 17 Wall. 132-139, 19 L. Ed. 106, is cited on the question of the allowance of interest, but before taking up that aspect of the case, we wish to advert to that part of it which should have been considered in discussing the liability of the defendant in this case. The Court said (p. 109 L. Ed.): "The declaration alleges that the fraud was a matter of pre-arrangement between

them, and their counsel insisted that proof of such pre-arrangement was essential to a recovery against Lincoln, but the Court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In this holding we perceive no error." And if we may be pardoned for further digression, we invite the Court's attention to the fact that all of these operations with respect to the timber in question undoubtedly tended to enhance the estate of the defendant, and he undoubtedly participated in them. The record shows (Tr. pp. 639-640, 686-687) that but a few short years before the depredations complained of commenced, this defendant purchased his interest in Eddy-Hammond & Co. for \$7,000.00 or \$8,000.00, \$4,000.00 of which he paid in cash and the balance he was given credit for by his co-partners. The record further shows (Tr. pp. 295-296) that the defendant's holdings on August 20th, 1885, in the Missoula Mercantile Company, the successor of Eddy-Hammond & Co., were 832 shares of stock of a total capitalization of \$300,000.00; and that in 1891, he owned 1020 shares of the first preferred stock of the corporation; and that in 1894, the capital stock of the corporation was \$1,200,000.00 and that the defendant owned 2142 shares of second preferred and 2156 shares of common stock in the corporation. This evidence, when taken in conjunction with the whole evidence in the case to the effect that all of these transactions respecting the



cutting of the timber in question were conducted through the office of the Missoula Mercantile Co., impels the conclusion that the defendant not only participated in the conversion, but that his estate was enriched thereby. The language quoted in the brief is not entirely indicative of what the Court meant. The Court just previous to the portion quoted said: "It is possible that the Court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods," which language indicates that, under the specific facts involved in that case, the Court itself was not positive that the allowance of interest was erroneous. The language of the Court with reference to the allowance of interest for the unlawful detention of money correctly announces the rule with respect to the detention of money, and, as we shall hereinafter show, the allowance of interest on the value of property converted is based upon the same hypothesis. This case is further interesting because the Court said: "But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the appeal, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an expressed rule of this Court. *It embraces several distinct propositions, and a general exception in such case cannot avail the party if any one of them is correct.*"

We ask that the quotation just given be con-

sidered in conjunction with our argument heretofore made that the exceptions made by the defendant upon the trial cannot now avail them with respect to the alleged error by the Court in giving instructions on the measure of damages and as to interest.

Neither is the case of *District of Columbia vs. Robinson*, 180 U. S. 92-107, 45 L. Ed. 440, in point because that was not an action in trover for the conversion of personal property, but was one for damages for alleged trespasses on lands of the defendant. The trespasses consisted in breaking and entering the defendant's close and the action was in effect *quare clausum fregit*. An entirely different rule prevails in such actions because the loss of the use of the property is included in the principal damages awarded rather than as interest, and if any interest is allowable, it is as punitive or enhanced damages.

The case of *United States vs. Sanborn*, 135 U. S. 271, 34 L. Ed. 112, contains certain elements which render it valueless in the case at bar. The Court declined to allow interest for the detention of the money because of the long delay in instituting the suit; but it is also to be noted that the moving reason for such disallowance was the fact that the money had voluntarily been paid to the defendant by the officials of the Government under a misinterpretation of a contract. It was not a case where the defendant converted property by taking physical

possession without the consent or permission of the owner.

## 2. The authorities supporting the allowance of interest.

In the case of *Vance vs. Vandercook Co.* (No. 2), 170 U. S. 468; 42 L. Ed. 1111, Mr. Justice White reviews carefully all of the cases where the question of the measure of damages is considered. It is true that this case was based upon the State statute of South Carolina, but in reviewing the cases and concluding that there was no difference between the rule prescribed by the statutes of South Carolina and the rule under the common law, the Court quoted the following from the case of *Sullivan vs. Sullivan*, 20 S. C. 509:

“The code has made no material changes in the primary rights of parties, or in the causes of actions, nor has it given any new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term ‘remedy’ in the sense of ‘redress’) are still the same. \* \* \* The action below was an action for the recovery of personal property and damages for its detention. It was an action in the nature of the old action of trover. It will not be denied that in actions of that kind, under the former practice (as a general rule), damages for detention beyond the property itself could be and were uniformly recovered, such damages being measured by different rules, according to the character of the property and the circumstances of each case. See case of *McDowell vs. Murdock*, 1 Nott & M’C. 237 [9 Am. Dec. 684], where the Court said: ‘It has lately

been determined by this Court, in several cases, that a jury cannot give vindictive damages in an action of trover. The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the true measure. Such, for instance, as the work and labor of negroes; interest on the value of dead property.' *Buford vs. Fannen*, 1 Bay, 2d ed. 273 [1 Am. Dec. 615]; *Harley vs. Platts*, 6 Rich. L. 318; *Kid vs. Mitchell*, 1 Nott & M'C. 338 [9 Am. Dec. 702]."

After quoting as above and deciding that the South Carolina statute had not changed the rights of the parties under the common law, the Supreme Court of the United States said (42 L. Ed. 1115):

"Under the decisions to which we have referred, it is evident that, in the case at bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this Court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of *Conrad vs. Pacific Insurance Co.*, 31 U. S. 6 Pet. 262 [8:392]. In the course of the opinion there delivered by Mr. Justice Story, the Court held that the trial judge did not err in giving to the jury the following instruction:

"*The general rule of damage is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or con-*



sequential damages, resulting to the owner, by the trespass'." (*Italics supplied.*)

And in summing up the case, the Court on page 1116 (42 L. Ed.) said: "and such recovery was confined, as we have seen, to interest on the value of the property."

In *Winchester vs. Craig*, 33 Mich. 205, the Trial Court (p. 207) instructed the jury that they should allow interest from the time of the conversion. In discussing the case, the Supreme Court of Michigan (p. 215) quoted from *Hill vs. Canfield*, 56 Pa. St. 454, as follows:

"It has not been an unusual thing in practice to allow damages beyond the actual value of the goods converted, *and interest*, although the general rule undoubtedly is the value of the goods *and interest*." (*Italics supplied.*)

On page 208 of the opinion, it appears that the Court had given careful consideration to all of the authorities defining the proper measure of damages in cases of conversion, and they said in substance that the general rule is that interest must be added to the value of the property; and it is to be noted that in reaching this conclusion, the Court makes no distinction between cases of innocent conversion and cases of wilful conversion. In finally approving the instruction given by the Court below, the Supreme Court said that the instruction was correct.

In the case of the *United States vs. Pine River Logging and Improvement Company*, 89 Fed. 907,

the Government contended that it had a right to recover the expenses incurred by it in tracing the property in question and in gathering the evidence to maintain the action. On appeal, the Government assigned as error the failure of the Court to instruct the jury to include in its verdict such expenses. It did not ask interest on the value of the property converted, but in reviewing the action of the lower Court in refusing to instruct the jury as requested, the Court of Appeals said:

“The rule permitting a plaintiff in an action of trover to have an allowance for expenses by him incurred in recovering property that has been wrongfully taken seems to have been applied heretofore only in those cases where the property is actually recovered by the plaintiff, and such recovery is pleaded by way of mitigation of damages. When the damages are thus mitigated, the plaintiff is permitted to recoup his necessary expenses in recovering the property; but where there has been no eventual recovery of the property by the plaintiff, and he is compelled to take its value, as in the case at bar, the better view seems to be that the recovery is limited to the market value of the property at the time and place of conversion, *and interest*. *Ewing vs. Blount*, 20 Ala. 694; *Collins vs. Lowry*, 78 Wis. 329, 47 N. W. 612; *Cattle Co. vs. Hall*, 33 Fed. 236, and cases there cited; 3 Suth. Dam. (2d Ed.), par. 1141. No error was committed, therefore, by the Trial Court in excluding the evidence as to expenses that had been incurred by the United States which it sought to introduce.”

The case of *New Dunderberg Mining Co. vs. Old, et al.*, 97 Fed. 150, is directly in point. In this case,

the plaintiffs did not pray for interest on the value of the ore wrongfully taken from the mining ground in question. In instructing the jury the Court said in substance that the plaintiffs were entitled to recover not only the value of the royalties which the Dunderberg Co. had received from the ore wrongfully removed, but also interest on such sum from the time it was enjoined from further working the mine. The Dunderberg Co. prosecuted an appeal from the judgment rendered in the lower Court, and, among other grounds, assigned as error the action of the Court in instructing the jury as it did in the matter of interest. The Court of Appeals, in passing upon this question, on page 153, said:

“The damages recovered in this case consist of the royalties which the Dunderberg Company had received from ore removed from this mine by its lessees prior to February 15, 1894, when they were enjoined from taking more, and interest on the amount of these royalties from that date. It is assigned as error that the Court instructed the jury that the defendants in error were entitled to this interest. It is said that this charge was erroneous, because the recovery of interest in a case of this character was unauthorized by the statutes of Colorado; because the damages sought were unliquidated, and no interest can be allowed on unliquidated damages; because the allowance of interest as damages is discretionary with the jury, and it is not the province of the Court to direct its recovery; and because the complaint contained no prayer for interest. It is a general and just rule that, where interest is reserved in a contract, or is implied from the nature of the promise, it is recoverable of right; and that, when

property or money has been wrongfully appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or of his funds. In cases of the latter class, its allowance is sometimes a matter of discretion, but generally, whenever one has wrongfully detained or misappropriated the money of another, he ought to pay and must pay interest at the legal rate from the date of the misappropriation, or from the beginning of the detention. *Cooper vs. Hill*, 36 C. C. A. 402, 94 Fed. 582; *Redfield vs. Iron Co.*, 110 U. S. 174-176, 3 Sup. Ct. 570; *U. S. vs. North Carolina*, 136 U. S. 211-218, 10 Sup. Ct. 920; *Jourolmon vs. Ewing*, 47 U. S. App. 679-686, 26 C. C. A. 23-27, and 80 Fed. 604-607; *U. S. vs. Pine River Logging and Improvement Company*, 61 U. S. App. 69, 32 C. C. A. 406, and 89 Fed. 907; 1 Sedg. Dam., sections 301, 303. A statute giving express authority therefor is not indispensable to the recovery of interest for the wrongful detention of money or of the value of converted property, and where no such statute exists, a reasonable rate of interest, conforming to the custom of the locality, will be given by way of damages. *Young vs. Godbe*, 15 Wall. 562; *Beckwith vs. Talbot*, 2 Colo. 639, 650. When interest is recoverable as damages, the result is the same, whether it is given under the one or the other name, and hence it is error without prejudice that it is allowed as interest when it should have been allowed as damages. *McCreery vs. Green*, 38 Mich. 172. Repeated decisions of the highest judicial tribunal of the State of Colorado, followed by those of the Supreme Court of the United States, have established the proposition that in actions for mining and converting ore and in actions for the conversions of personal property, the injured party may recover, under the statutes of that State, not only the value of



the property converted, but also 'a sum equal to legal interest on the same from the time of the conversion.' Mills' Ann. St. Colo. 1891, sections 2251, 2252; *Refining Co. vs. Tabor*, 13 Colo. 41-59, 21 Pac. 925; *Machette vs. Wanless*, 2 Colo. 170; *Sutton vs. Dana*, 15 Colo. 98, 25 Pac. 90; *Perkins vs. Marrs*, 15 Colo. 262-266, 25 Pac. 168; *Sylvester vs. Craig*, 18 Colo. 44-48, 31 Pac. 387; *Cattle Co. vs. Mann*, 130 U. S. 69-79, 9 Sup. Ct. 458. This is the established rule in other jurisdictions. *Dows vs. Bank*, 91 U. S. 618-637; *Harrison vs. Perea*, 168 U. S. 311-324, 18 Sup. Ct. 129; *Smith vs. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39; *Coulson vs. Bank*, 13 U. S. App. 39, 4 C. C. A. 616, and 54 Fed. 855; *Lumber Co. vs. Smith*, 2 C. C. A. 97, 51 Fed. 63; *Bradley vs. Geiselman*, 22 Ill. 494-498; *Railroad Co. vs. Cobb*, 72 Ill. 148-153. The case of *Refining Co. vs. Tabor*, 13 Colo. 41-59, 21 Pac. 925, has answered the contentions of counsel for the plaintiff in error that interest may not be allowed when the damages are unliquidated, and that it is error for the Court to direct the jury to give it. That case involved two actions for \$25,000 and interest for converting and selling ore which had been taken from the plaintiff's mine. The amount recovered was only \$18,388.12, so that the claim, when presented, was unliquidated, and yet the judgment was reversed because the Court below refused to instruct the jury to add to the amount of the value of the property a sum equal to legal interest from the time of its conversion. Moreover, while, as far as the knowledge of the Olds extended, their claim was unliquidated when they brought their suit, and they prayed for a judgment for \$300,000, yet the knowledge of the plaintiff in error made the claim clear, definite and exact. It was the amount of the royalties which it had received from the ore taken from the mine of the defendants in error, and that amount was clearly dis-

closed upon its books of account. It could have prevented the running of interest by remitting the amount to its owners. The fact that they claimed more than was actually due them furnished no excuse to the Dunderberg Company for its failure to pay them the amount which was due, and no defense to their claim for interest for its detention."

The case of *Harrison vs. Perca*, 168 U. S. 311, was an action by an administrator to recover the assets of an estate from the defendant who had no right to them but who had converted them to his own use. In fixing the liability of the defendant, the Court declared that the plaintiff had a right to recover interest on the value of the property that had been converted. In disposing of this assignment of error, the Supreme Court, on page 324, said:

*"Nor did the Court below err to the prejudice of the defendant in the matter of charging him with interest at six per cent on the amount of the assets converted by him. The interest is charged by reason of his conversion of the whole assets of the estate. It is not a mere mingling of the funds with his own while recognizing his liability to repay them and having them at the same time ready to respond when demanded. It is a wholesale conversion of the entire assets. The facts found make the inference perfectly clear that such conversion was intended from the time of his marriage with the mother of the minor. His false entries in the reports are very strong evidence in that direction.*

"Neither is it a question of what profits (if any) have been made by an individual who has mingled trust funds with his own and used them for his personal benefit, although never denying

his liability to account. In such cases it is sometimes proper to inquire what profits have been made in order to charge the trustee with their amount, if greater than the usual rate of interest. This is not such a question. The defendant has, without the least right or title, taken moneys belonging to the estate of a deceased minor, and converted them substantially to his own use, while denying the right of an administrator of such estate to the possession thereof. *He is properly charged, at least, with the usual interest, without investigation into the question of what profits he may have made."*

Sutherland on "Damages" (3d Ed., Vol. 1, p. 303, par. 105) says:

"And a party who is entitled to recover and must accept its value in place of the property itself should always be allowed interest on that value from the date which the property was lost or destroyed or converted. Whether he recovers the value for the failure of a vendor or bailee to deliver, or by reason of the destruction, asportation, or conversion of the property by the wrongdoer, interest is as necessary to a complete indemnity as the value itself. The injured party ought to be put in the same condition, so far as money can do it, in which he would have been if the contract had been fulfilled or the tort had not been committed, or the loss had been instantly repaired when compensation was due."

See also:

Sedgwick's "Elements of Damages"

(2d Ed.), p. 137;

1 Sedgwick on Damages, 633;

Joyce on Damages, Vol. 2, p. 126, par. 1105;

Sutherland on Damages, Vol. 2, p. 969, par. 355.

In the case of *Anderson vs. Besser*, 91 N. W. 737, the Supreme Court affirms the judgment which was based upon the instruction of the lower Court, directing the jury to allow interest from the time of the conversion.

In the case of *Trustees of Dartmouth College vs. International Paper Co.*, 132 Fed. 92-106, the Court allowed interest on value of property taken.

In the case of *Tome vs. Dubois*, 6 Wall. 548, 18 L. Ed. 943, the Supreme Court of the United States approved an instruction by the lower Court allowing interest on the value of the property converted from the time of conversion.

In the case of *Clark vs. Whitaker, et al.*, 19 Conn. 319-330, the Court said:

“The rule of damages, in this case, was the value of the property converted, *with interest from the time of the conversion.*”

In the case of the *United States vs. Eccles*, 111 Fed. 490, the Court on page 493 said:

“I am of the opinion that the plaintiffs are only entitled to recover the value of the timber standing in the trees at the time of the taking, and before the acts of the defendants had increased its value, together with legal interest from November 4, 1899, as damages for the time during which plaintiffs have been deprived of their property. *Mining Co. vs. Old*, 38 C. C. A. 89, 97 Fed. 150.”

We invite attention to the note appended to the



case of *Fell vs. Union P. R. Co.*, 28 L. R. A. (N. S.) 1, and particularly that portion of the note found on pages 28 *et seq.*, where the question of allowance of interest for the conversion of property is fully discussed, and a general rule established that interest will be allowed from the time of conversion.

See also *Ward vs. Carson River Wood Co.*, 13 Nev. 44-60-62-64.

We therefore respectfully submit that the plaintiff in error failed to properly preserve his exception to the Court's instruction, and that the Court's instruction on the question of interest was entirely proper.

**V. The Court did not err in instructing the jury that, if the manner of taking the timber was such as to enhance plaintiff's difficulty in establishing the exact quantity and value of the timber so taken, then the law authorized the jury to indulge every fair and reasonable inference justified by the circumstances in fixing the amount that the plaintiff was entitled to recover.**

We will not consume the time of this Court in attempting to answer in detail the fatuous remarks of counsel with respect to the language of the Court in this instruction. It is sufficient to point out that the trespass committed by the defendant and his associates covered a wide area of country; that they were engaged in cutting indiscriminately from public and private lands, and that they cut without

regard to section lines or natural objects. Under their plea of the statute of 1878, they were required by the rules and regulations of the Secretary of the Interior to keep a set of books showing the sections from which the timber was cut and removed, and in the event no survey of the land existed, they were required to describe the localities by natural objects. This they wholly failed to do and they left plaintiff to its own resources to acquire such knowledge as it could, after a long lapse of time, as to the location and quantity of the cutting. The cross-examination of the timber cruisers who estimated the timber for the Government shows clearly that counsel for the defendant tried to create in the minds of the jury the impression that the estimates given were wholly incorrect and were the result of mere guess rather than of accurate measurements. The Government was compelled to pursue this method in estimating the amount of timber solely because the defendant and his associates failed to keep the records required. If they had been acting in good faith and performed their duty under the regulations, the jury would have known exactly the amount of timber that had been cut and we would not have been remanded to the work of the cruisers. It was solely because of the attitude of the defendant and his associates in the cutting, and of counsel in their cross-examination of the cruisers, that called for the instruction now complained of. It was taken almost verbatim from the case of *Sauntry vs. United States*, 117 Fed. 132, where the Court said (pp. 133-4-5):

“This action was brought by the United States against the plaintiffs in error to recover damages for cutting and taking away from lands of the United States timber standing and growing thereon. At the trial of the case in the Court below, there were two contested questions of fact: (1) Did the plaintiffs in error cut any timber from the lands described in the complaint? (2) If so, how much timber was cut by them? It appeared from the evidence that the timber was cut from the lands in question between October 1, 1887, and May 1, 1891. The United States discovered the trespass in 1895, and Special Agent Johnson went upon the lands in question for the purpose of making a scale of the timber which had been cut. Richard H. Peck, George W. Harmon and William Mack assisted in this work. Two witnesses—Peck, called by the United States, and Harmon, by plaintiffs in error—testified as to the amount of timber cut. Their estimates substantially agreed. These two witnesses, from the very nature of the case, could only estimate the amount of timber cut by measurement of the stumps and tops of trees found years after the trespass had been committed. The trial below took place in July, 1901, and resulted in a verdict for the United States. The learned trial judge, in his charge to the jury, used the following language:

“ ‘Now, that is a difficult question to prove. These transactions date far back in time, and that would make it difficult to prove if there were no other difficulties in the case; but if you are satisfied that the defendants cut and removed the timber from these lands, then you will see that the very act makes it very difficult, if not impossible, to prove the extent of the wrong which they did, and that the wrongful act enhances the difficulty of the proof. But

there is a rule of law which will aid you in passing upon that feature of the case. If you are satisfied from the evidence that the defendants cut and removed the timber from these lands, then in ascertaining the quantity of the timber so cut and removed, you may take into consideration the fact that the wrong of the defendants makes the determination of the quantity of such timber difficult. The law will not allow a wrongdoer to profit in any way by his own wrongful act. I will explain that matter to you somewhat more fully in the latter part of my charge. But for the present now, I say the law will not allow a defendant to profit by reason of the fact that he has made the establishment of the exact quantity of timber difficult. In this connection you must bear in mind that I am assuming all the time that you will find the defendants were the parties who cut and removed the timber from these lands. If you do not find that to be the fact, then this portion of the charge has no relevancy whatever to the case. It is all based upon the assumption that you find that they were the parties who cut and removed the timber; then if, upon a fair and full consideration of all the evidence in the case, you are still in doubt as to the quantity of timber which they cut and removed, you may indulge every fair and reasonable inference justified by the evidence in favor of the plaintiff and against the defendants. The rule has been very well stated in the following language: When the nature of a wrongful act is such that it not only inflicts an injury but takes away the means of proving the nature and extent of the loss, the law will aid the remedy against the wrongdoer, and supply the deficiency of proof caused by his misconduct by making every reasonable intendment against him and in favor of the person whom he has injured.'

“To the giving of this charge the plaintiffs



in error excepted, and it is assigned as error here. Counsel for plaintiffs in error does not deny the correctness of the rule of law stated by the Trial Court, but denies that the case on trial was one in which the rule could have any application, for the reason that there was no conflict in the testimony as to the amount of timber cut. It is true that the witnesses substantially agreed as to the amount of timber cut, but the way the witnesses arrived at their estimates, which was by measuring stumps and tops of trees years after the cutting, demonstrates that there was an inherent element of uncertainty in their calculations. If the defendants cut the timber, it is fair to presume that they had in their possession, or under their control, very much better evidence than was in the possession of the United States; so that whether we view the case as one where the evidence of the extent of the injury inflicted was destroyed by the trespass, or as a case where the exact amount of the timber cut was known to defendants, but which evidence they failed to produce, we think the charge of the Court complained of was applicable to the case on trial. The Trial Court repeatedly and guardedly instructed the jury that only in case the jury found that the plaintiffs in error cut the timber could they apply the rule stated in the foregoing charge. After all, what did the Court state to the jury? As a result of the rule of law announced, the Court said to the jury that, if they should find the plaintiffs in error cut the timber, then if, after a fair and full consideration of all the evidence in the case, they were still in doubt as to the quantity of timber cut and removed, they might indulge in every fair and reasonable inference justified by the evidence in favor of the United States and against the plaintiffs in error. The jury had the right, without being told, to indulge in any fair and reasonable in-

ference in favor of the United States which was justified by the evidence. 'All evidence,' said Lord Mansfield in *Blatch vs. Archer* (Cowp. 63-65), 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.' It is said by Mr. Starkie in his work on Evidence (Volume 1, p. 54):

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'

"We think that the case now under consideration afforded a proper occasion to invoke this principle in the law of evidence."

In view of the fact that the defendant admitted that at least a portion of the timber in question had been converted by his associates and claims the benefits of the Act of 1878, we submit that this case was one calling for the rule here laid down, and that it was not error for the Court to give the instruction complained of.

## **VI. The instruction relative to the timber taken from the land embraced in the homestead entry of Henry F. Edgar.**

Counsel complained of the instruction given by the Court with respect to the timber cut and removed from the lands embraced in the homestead

entry of Henry F. Edgar. The evidence offered with respect to this particular tract of land shows conclusively that Edgar occupied it only so long as was required to cut the saw timber and dispose of it to the defendant and his associates. The evidence offered by the defendant, when given its most favorable interpretation, shows that Edgar resided upon the claim but a very short time, that his principal occupation was in furnishing supplies to the Fish Creek Camp of the Hammond people, and that he did not care sufficiently about the claim to procure a certified copy of his naturalization papers and submit it with his final proof. On the other hand, the evidence offered by the Government shows that the entry was cancelled because of his lack of good faith, and his failure to reside upon and cultivate the land in the manner required by law. Counsel complained of lack of fairness in the trial of this suit, but we submit that the manner in which plaintiff introduced the record respecting the cancellation of this entry shows that counsel for the Government was over-zealous in keeping out of this record and from the jury anything which might tend to prejudice the defendant. Instead of offering the entire record of the General Land Office, which was competent, to show the true reason why the homestead entry of Henry F. Edgar was cancelled, the record was submitted to the Court and the Court made a statement of its conclusions rather than reading the entire record to the jury. We quote from p. 723 of the transcript, as follows:

“Mr. Hall: We desire to offer in evidence the records of the General Land Office showing why the homestead entry of Henry F. Edgar was cancelled by the Department of the Interior.

“Thereupon a discussion ensued between counsel for each side of the Court concerning the admissibility in evidence of said records, it appearing that there was much hearsay and immaterial matter contained therein, and it was finally agreed between the parties that the reason for the cancellation of said homestead entry of Henry F. Edgar by the Department of the Interior might be stated by the Court to the jury to be as follows:

“The Court (addressing the jury): The entry was cancelled by reason of the conclusion that it was not made in good faith, based upon the report of a Special Agent; such conclusion was reached by the Acting Commissioner of the General Land Office. Such conclusion was reached at a hearing at which Edgar was cited to appear, but did not appear.”

In addition to this, the testimony of former Special Agent Helmick (Tr. pp. 133-4-5), former Special Agent George H. Reeder (Tr. pp. 136-7-8) and former Special Agent M. J. Haley (Tr. p. 163) shows conclusively that the residence and cultivation by the entryman Edgar was not in good faith. But a very small area, probably less than an acre, was put in garden and no effort whatever made to cultivate the portion of the claim from which the timber was cut. Witness Helmick testified: “As to whether the cutting had been done in such a manner as to indicate it had been done for the purpose of culti-



vating and the improvement of the land, or for the purpose merely of cutting and removing the timber, inasmuch as there was no ground cultivated whatsoever, my impression is that that land was cut off simply for the timber that was on it. I drew that conclusion simply from the fact that there was not any cultivation and the logs had all been taken off, removed." Witnesses Haley and Reeder testified fully and positively to the same facts.

Counsel for the defendant rely solely upon the case of *H. D. Williams Cooperage Co. vs. United States*, 221 Fed. 234, which was decided by the Circuit Court of Appeals for the Eighth Circuit on March 1, 1915. The opinion of the Court in this case is not only contrary to the doctrine established by the Supreme Court of the United States and other Federal Courts, but the case was overruled in the recent case of *Union Naval Stores Company vs. United States* (No. 80—October Term, 1915. Decided February 21, 1916.) In this case, the Supreme Court of the United States said:

"The facts, as they appeared at the trial, were as follows: Freeland had made an application for a homestead entry under Section 2289 Rev. Stat., but never perfected it. Being the owner of other lands in the same neighborhood, Freeland agreed with one Rayford to give him a turpentine lease for a lump sum upon all of his timber, not including the homestead. A third party having been employed to reduce the agreement to writing, Freeland discovered that the homestead had been included, and he called Rayford's attention to this and

tendered back the check given for the consideration money, on the ground that if the homestead was included in the lease, he would be in danger of losing his entry. Rayford replied: 'There is no law against turpentineing a piece of homestead land as long as you are on it.' And so Freeland made no further objection. \* \* \*

"There was no error in charging that 'the boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act, and that from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler, or from any person into whose possession the same may have passed.' This refers, of course, as other parts of the charge clearly show, to a manufacture by Rayford, who was himself the trespasser.

"The rights and privileges of an entryman with reference to standing timber were considered and discussed in *Shiver vs. United States*, 159 U. S. 491-497-498, where, after reviewing the pertinent sections of the Revised Statutes, it was said: 'From this resume of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; . . . third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the

door to manifest abuses of such right. Obviously, the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation. . . . It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. . . . By analogy, we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the Court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation.'

"There is nothing in the letter or policy of the homestead acts that permits the boxing and chipping of pine trees for the purpose of extracting turpentine for sale and profit. It cannot be regarded as cultivation within the meaning of the act; it affects the value of the inheritance too seriously for that. As is well known, the process requires the cutting of a deep gash or 'box' into the side of the tree, so shaped as to catch and retain a considerable quantity of the crude gum, and repeated chippings thereafter, by each of which an additional portion of the bark is cut through to the wood so as to expose a fresh bleeding surface. It not only saps the vital strength of the tree

and lessens its power to resist the force of the wind, but exposes the wood to decay and to wood-boring grubs and beetles; while the waste gum, being highly inflammable, increases the danger of forest fires. Government publications have repeatedly pointed out the ill effects of the practice. \* \* \*

“Rayford, in conducting his turpentine operations upon the homestead with notice that the land was the property of the United States, became a wilful trespasser, although he may have supposed, as he is said to have declared, that there was ‘no law against it.’ He acted with full notice of the facts, and his mistake of law cannot excuse him.”

The opinion of the Circuit Court of Appeals for the fifth circuit in *Parish et al. vs. United States*, 184 Fed. 590, is directly contrary to the opinion of the eighth Circuit Court of Appeals in *H. D. Williams Cooperage Co. vs. United States*, *supra*. *Parish vs. United States* is cited with approval in the case of *Union Naval Stores Company vs. United States*, *supra*. In *Parish vs. United States*, the Court of Appeals said:

“After all the evidence was introduced and the arguments had, the Court instructed the jury as follows:

“‘That Wyatt S. Parish was in law a wilful trespasser in extracting gum from the trees on his homestead, and for that reason the defendants are liable for the value of the spirits of turpentine and rosin manufactured from the gum, and not merely for the value of the crude gum; that they (the jury) should find for the plaintiff the value of the spirits of turpentine



and rosin manufactured by defendant, W. L. Parish, from the gum purchased by him from Wyatt S. Parish, who extracted it from trees upon his homestead.'

"The defendants excepted to these charges, and requested the Court to instruct the jury:

"'If you find from the evidence that the homesteader, Wyatt S. Parish, in boxing trees and extracting the gum from his homestead, honestly and really believed that he had the right to do so, and that he had no intention of defrauding the Government by so doing, or of taking property not his own, then you should find as damages the value of the crude gum, and not the value of the manufactured product.'

"And again:

"'Even though, under the law, Wyatt S. Parish had no right to extract gum from the trees on his homestead, still, if he honestly believed that he had the right, and did not intend to defraud the Government of property which he knew belonged to it, and he extracted and sold the gum under the bona fide belief that he had the right to do so, and he was at the time in good faith complying with the law requiring residence and cultivation and the like to enable him to perfect his homestead entry and really intended to so perfect it, then he was not a wilful trespasser, and the damages should be estimated at the value of the crude gum, and not the value of the manufactured product.'

"These requests the Court refused, and the defendants excepted. There was a verdict and judgment for the plaintiff, and the defendants sued out error, and under suitable assignments submit that the Trial Court erred in the charges given and in refusing the requested charges.

"In our opinion, neither of these assignments of error is well taken. The charges given by

the Court correctly stated the law, and the requested charges were rightly refused. We cannot follow the counsel for the plaintiffs in error through an examination of all the cases which his commendable research has enabled him to place upon the brief. Besides, the well recognized principles of justice and the practice in equity, which Courts of law now generally adopt, a few comparatively recent and pertinent cases amply support the view of the law taken by the trial judge. We content ourselves with referring to these cases: *Woodenware Company vs. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *United States vs. Taylor* (C. C.), 35 Fed. 484; *Shiver vs. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231, and the sections of the Revised Statutes cited in the opinion of the Court in the Shiver case.

“This view as to what the law was at the time the trespass in this case was committed has, in our judgment, been approved by Congress by the Act of June 4, 1906, making such trespasses a misdemeanor. Act June 4, 1906, c. 2571, 34 Stat. 208.”

See also:

*Shiver vs. United States*, 159 U. S. 491, 40 L. Ed. 231;

*U. S. vs. Taylor*, 35 Fed. 484;

*U. S. vs. Murphy*, 32 Fed. 376;

*U. S. vs. Cook*, 86 U. S. 19 Wall. 591, 22 L. Ed. 210;

*Bunker Hill M. & C. Co. vs. U. S.*, 226 U. S. 548, 57 L. Ed. 345;

*Stone vs. U. S.*, 167 U. S. 178, 42 L. Ed. 127.

## **VII. The instruction relative to the character of the Hell Gate lands.**

The Court instructed the jury as follows:

“In this case defendant has offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by defendant and admitted, touching the character of the land along the Hell Gate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

“In this connection and as bearing on the question of such good faith, you will understand that the phrase ‘said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry,’ as used in the Act of June 3, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and

to the persons cutting. If the land in question is worth more for agricultural purposes than mining, it is not mineral land within the meaning of the Act, although it may contain some measure of gold or silver or other valuable minerals. This is also true of timber lands. If the lands along the Hell Gate River from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the Act of June 3, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land, it is taken at the peril of being held responsible therefor."

Counsel contend that this instruction was erroneous because it said that if the lands in question were more valuable for the timber thereon than for the mineral contained therein, the defendant and his associates had no right to cut therefrom under the Act of June 3, 1878. They object most strenuously to this test of comparative value and say that the only test was whether or not the lands contained mineral in any appreciable quantity or in sufficient quantity to permit a mineral entry thereon being made. They cite in support of their contention *Chrisman vs. Miller*, 197 U. S. 313, 49 L. Ed. 770; *Steele vs. Tanana Mines R. Co.*, 148 Fed. 678, 78 C. C. A. 412, which cases are not in point because there the question was as to whether or not there was



sufficient mineral in the lands involved to warrant their entry under the mining laws, and the question of diligence between contending locators. The language of the Mineral Land Act of June 3, 1878, and of the Timber and Stone Act of the same date, is sufficient to show the distinction between those cases and the one at bar. The Mineral Land Act of June 3, 1878, contemplates only those lands which are "mineral, and not subject to entry under existing laws of the United States except for mineral entry." The Timber and Stone Act of the same date requires that land, in order to be entered thereunder, must be "valuable chiefly for timber" or "valuable chiefly for stone." This clearly indicates that lands containing some slight quantity of mineral might properly be entered under the Mineral Land Act, and also that if the same lands had growing on them sufficient timber to render them more valuable for the timber than for the slight mineral content, they might be entered under the Timber and Stone Act. It therefore follows that the language of the Mineral Land Act of June 3, 1878, does not mean that timber may be cut from lands which contain any quantity of mineral, however small. The Act clearly says that if they may be entered under the Timber and Stone Act, then they do not fall within the provisions of the Mineral Land Act of June 3, 1878. This question was fully discussed and determined by the Supreme Court of the United States in *United States vs. Plowman*, 216 U. S. 372, 54 L. Ed. 523, and the Court on page 525 (L. Ed.) said:

“The instructions appear to us to have paid too little regard to the words of the Act, defining the land on which it permits timber to be cut as ‘mineral, and not subject to entry under existing laws of the United States, except for mineral entry.’ As was said in *Northern P. R. Co. vs. Lewis*, 162 U. S. 366-376, 40 L. Ed. 1002-1006, 16 Sup. Ct. Rep. 831, ‘the right to cut is exceptional and quite narrow,’ and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands ‘valuable for minerals’ or containing ‘valuable mineral deposits.’ Rev. Stat., secs. 2302-2318-2319, U. S. Comp. Stat., pp. 1410, 1423, 1424. See section 2320. The matter was much discussed in *Davis vs. Wiebold*, 139 U. S. 507, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628, and there it was said that the exceptions of mineral land from pre-emption and settlement, etc., ‘are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.’ P. 519. A Land Department rule is quoted, with seeming approval, that ‘if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver,’ pp. 521, 522, citing *United States vs. Reed*, 12 Sawy. 99, 104, 28 Fed. 482. Again it was said: ‘The exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were, at the time of the grant, known to be so valuable for their minerals as to justify expenditure for their extraction.’ P. 524. These are the tests to which the Act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests.

“It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for minerals, a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, Courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. But the objection is stated too strongly. As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply. The regulations of the Secretary of the Interior for a long time, and it would seem always, have been in accord with our opinion and the language of the act.”

### **VIII. The reception and rejection of certain evidence.**

**A. The refusal of the Court to permit the witness, W. H. Hammond, to testify as to the terms of the lease under which he rented the Bonner Mill from the Blackfoot Milling & Manufacturing Co.**

Counsel for the defendant assign as error the action of the Court in refusing to permit the introduction in evidence of the purported lease dated the 10th day of February, 1888, from the Blackfoot Milling & Manufacturing Co. to W. H. Hammond.

The lease itself is not incorporated in the record, but it is shown that the paper offered by the defendant was signed by the witness, Wm. H. Hammond,

and by one Charles H. McLeod, who represented himself thereby to be the President of the Blackfoot Milling & Manufacturing Co. There was no seal of the corporation, nor was any attestation by the Secretary attached to the document. It was not shown by the witness, Wm. H. Hammond, or by anyone else, that the paper offered was the original instrument executed, and there was no accounting for the loss or destruction of the original document. The plaintiff objected to the admission of the paper offered for the reason that it did not bear on its face any authority from the Blackfoot Milling & Manufacturing Co. for its execution; that it was merely signed by the President; was not acknowledged before a Notary Public, and that it purported to be an instrument affecting the right of possession to real property for more than a year. The Court sustained the objection for the reason that there was no proof that the paper offered had been executed by the corporation purporting to execute it. Thereupon, and without attempting to account for the loss or destruction of the original instrument, counsel for the defendant attempted to prove its contents by the witness Hammond. The questions asked the witness apparently were not for the purpose of altering or in any manner changing the terms of the lease, but were simply an attempt on the part of counsel to have the witness recite the terms as expressed in the lease. This the Court declined to permit them to do, and rightly so, because it is well settled that the terms of an instrument of this sort



cannot be proven by parol evidence unless the original instrument has been lost or destroyed. The transcript shows that such an instrument was executed, and it was the duty of the defendant to either produce it or account satisfactorily for its absence. The paper which they offered in evidence was in no wise competent because of its lack of proper execution by the corporation. It is also apparent that the sole purpose of this offer was to prove that the witness, Hammond, had operated the Bonner mill under lease from the Blackfoot Milling and Manufacturing Company. The record (Tr. p. 434-5, 438) discloses that the witness had already testified as to the existence of such lease and his operation of the mill under it, and we submit that the Court did not err in excluding the testimony of the witness as to the specific terms of the instrument itself.

**B. The two affidavits relative to the mineral character of the Hell Gate lands.**

Objection is also made that the Court refused the defendant the right to read to the jury the two affidavits respecting the mineral character of the lands embraced in the trespass complained of. These affidavits are incorporated in the record (Tr. p. 560-2). They were objectionable for two reasons. *First.* It was not proper to present to the jury *ex parte* evidence of the mineral character of the lands in controversy. The evidence shows that the witness, Fenwick, claimed to rely upon these affidavits

and he so testified; but to submit the substance of the affidavits to the jury would have been allowing them to hear and consider purely hearsay evidence. It was competent, and the witness, Fenwick, testified without objection, that he based his belief as to the mineral character of the territory upon information that he had received; but we submit that it would have been highly improper to have permitted him to have recited in detail all of the conversations that he had with various persons respecting the character of the land. This in effect would have been permitting the makers of the affidavits to have testified without affording the plaintiff opportunity to cross examine them with reference to the specific lands involved in suit. *Second.* An examination of the affidavits discloses that they did not refer to any specific lands, but were of a general nature, embracing "land and country lying along the line of the Northern Pacific Railroad between the town of Missoula and the town of Bearmouth." There is nothing in these affidavits to indicate that the lands now in controversy are included in the area of country described, and, if for no other reason, we insist that they were incompetent, irrelevant and immaterial, because they were too general and did not refer to the lands in controversy.

**C. The defendant's testimony as to the extent of his holdings in the Missoula Mercantile Co. in the year 1906.**

Error is assigned because the Court compelled the defendant to testify with respect to the value of his

stock in the various corporations concerned in these transactions. In view of the testimony of defendant on direct examination, we insist that he was not prejudiced by the questions and answers objected to. It is to be noted that his answers to all of the questions, except that found on page 710, where he stated the value of his holdings in the Missoula Mercantile Co., were evasive and would in no manner tend to prejudice him before the jury. He gave no definite answer to any of the questions propounded. However, in the question last referred to, he did state that his holdings in the Missoula Mercantile Co. were worth at least \$250,000 or \$300,000. We do not believe that this was sufficiently prejudicial to cause this Court to reverse the judgment. Upon his direct examination, the defendant recited his entire history in great detail. He started with his arrival in the town of Missoula in 1868, and, with some show of pride, in which he was joined by counsel, he related the entire history of the amassing of a great fortune. In view of the fact that he is here charged with having committed the depredations through the instrumentality of the various corporations named, we cannot see that he was prejudiced to any extent by this one question which stated the value of his holdings in the Missoula Mercantile Co. In order that he might be rendered liable in this case, it was necessary to a certain extent to show that he had derived some benefit from the conversion complained of, and we frankly submit that his answer to this question shows that his interest in the Missoula

Mercantile Co. increased from time to time, and it is not unreasonable to suppose that such increase was due largely to the transactions here complained of.

**D. The Court did not err in admitting in evidence part of the duplicate assessment books of the County of Missoula relating to the assessment of the Missoula Mercantile Co.**

These duplicate assessment lists were offered by the plaintiff on the theory that they were declarations against interest made by corporations of which the defendant was the managing director and one of the officers. Foundation for their introduction was laid by the testimony of C. H. McLeod and Gust Moser, who testified that the assessment lists were prepared by Mr. Moser and submitted to the board of directors before being handed to the County Assessor. Counsel for the defendant cite no authorities which condemn the introduction of such evidence, and we do not believe that it is necessary to cite any authorities in support of our contention that they were declarations against interest which were material because the defendant was, in effect, charged with a conspiracy to convert the timber in question.

Counsel have failed to point out wherein the matters complained of in any manner prejudiced the rights of the defendant in the trial of this case, and



we submit that if the admission or rejection of this evidence was error, it was harmless error and does not warrant the reversal of the judgment.

*Klein vs. Hoffheimer*, 132 U. S. 367, 33 L. Ed. 373;

*Louisville & N. R. Co. vs. White*, 100 Fed. 239.

## IX. The Complaint.

By demurrer and amended demurrer, the defendant attacked the complaint and amended complaint. In both instances the demurrer was overruled, and counsel now complain that these demurrers should have been sustained. The principal burden of their complaint is that the pleading was indefinite and uncertain, and that it should have described with more particularity the property converted, the place from which and the time when converted. The complaint follows the form which has been used in the Federal Courts for many years without objection. It sets forth specifically the lands from which the timber was taken and the total quantity taken. The only place where it may be attacked for any uncertainty at all is with respect to the time of the commission of the acts complained of. The whole burden of the complaint is that it was a continuing trespass, and it is good pleading to allege the several dates of a continuing trespass as they were alleged in this complaint (31 Cyc. 106). It is also to be noted that all of the facts alleged in the complaint

were undoubtedly within the knowledge of the defendant, and in such instances the burden is not upon the plaintiff to allege with undue particularity the facts which the defendant himself knew (31 Cyc. 106). If defendant desired to know the exact amount of timber cut from each particular tract of land, the exact time of the cutting and by whom cut, he should have asked for a bill of particulars and not attempted to have elicited such information by demurrers. We submit that, on the whole, the complaint sets forth fully and definitely all of the elements required by good pleading (38 Cyc. 2065-6).

#### **X. The re-reading of testimony after the jury had retired to deliberate.**

Counsel have assigned as error the action of the Court in refusing to permit them to read portions of the evidence to the jury after it had retired to deliberate on its verdict. The record discloses that this situation was brought about solely by the action of the jury. They came into Court voluntarily and asked that certain portions of the testimony be re-read to them. The Court thereupon, *and without objection from either party*, permitted the reading of the testimony of Sidney C. Mitchell and a portion of the testimony of Thomas G. Hathaway. Before the reading of Mr. Hathaway's testimony was completed, the Court interrupted the proceedings and inquired of the jury as to their ideas of the propriety of reading further. Thereupon counsel for the defendant objected to the discontinuance

of the reading of the testimony, and the Court permitted counsel for the plaintiff to continue the reading of the direct examination of the witness. At the close of the reading of the direct examination the Court retired from the court room and the members of the jury consulted together. Upon the return of the Court the foreman of the jury informed the Court and counsel that the jury had come to the conclusion that they did not care for the reading of any further testimony. The record discloses that the reading of the testimony was consented to by counsel for both parties. Counsel for the defendant do not now object to the fact that the jury was permitted to hear any of the testimony re-read, but contend that error was committed because the Court would not allow them to read the portions of the evidence they wanted to again present to the jury. While it is irregular to re-read any of the testimony to a jury, we do not believe that the plaintiff in this case should be penalized by a reversal of the judgment because of the action of the Court. The jury, without suggestion from Court or counsel, asked for the reading of the testimony and when they had heard sufficient to satisfy them, they so indicated to the Court. The authorities cited by counsel for the defendant in their brief are not in point because in all of those cases, either one or the other of the parties objected to the re-reading of the testimony. In the case of *Padgitt vs. Moll*, 159 Mo. 143, 52 L. R. A. 854, the Court condemns the practice of reading the evidence to the jury after it has retired to

deliberate, yet the part of the opinion on page 858 would seem to indicate that where such reading is without objection, it will not be considered erroneous, for it is said: "In this case, the learned judge should have adhered to his original purpose to allow the stenographer's notes to be read only on condition that counsel on both sides consented thereto."

On page 254 of their brief, counsel contend that they would have been benefited by the reading of the cross-examination of Hathaway because a portion of the testimony of said witness relating to the disposition made of the product of the Bonita mill was contrary to what the witness had testified on his direct examination. We cannot see how this could have been material because the jury's request for the reading of the testimony made no reference to the disposition of the product of the Bonita mill, but referred solely to the defendant's relations with the several corporations named. An examination of all of the evidence of Hathaway discloses that he did not make any contradictory statements whatever with respect to Mr. Hammond's relation to the four corporations involved. We submit, therefore, that the re-reading of the testimony was not prejudicial to the rights of the defendant, and that the judgment should not be reversed on that ground.

## **XI. The costs.**

Defendant has assigned as error the action of the Trial Court in sustaining the Clerk in taxing the



costs of seven witnesses who attended the trial and came from various localities outside of the Northern District of California.

It appears that all of these witnesses resided in the States of Montana, Washington and Idaho, and while it does not appear from the record, we assume that counsel will not be offended if we state that all these witnesses traveled via Portland, reaching the Northern line of this District where it is crossed by the Southern Pacific Railroad, a distance of 230 miles from the City of San Francisco. In taxing the costs of these witnesses, the Clerk allowed them mileage at five cents a mile for a distance of 460 miles, ~~plus~~<sup>double</sup> the distance from San Francisco to the Northern line of the District. We appreciate the attitude of counsel with respect to this assignment of error. We feel confident that it is not made because of the few dollars and cents involved, but in order that this question may be definitely settled. With that same purpose, we review the cases in which this question has been passed upon in order that this Court may have before it the different views of the judges who have had to deal with this question.

#### FIRST CIRCUIT

In *Prouty vs. Draper*, 2 Story 199, Fed. Cas. No. 11447 (1842), it was held that mileage should be taxed for witnesses from their places of abode re-

gardless of distance; that while the Judiciary Act of 1789 authorized the taking of depositions beyond the 100-mile limit, such taking was optional.

Under the existing statute, a party may take the deposition of a witness residing more than one hundred miles from the place of trial, at his option, regardless of whether or not such witness lives within or without the District.

In *Whipple vs. Cumberland Cotton Mfg. Co.*, 3 Story 84, Fed. Cas. No. 17515 (1844), it was held that a witness going from Boston, Massachusetts, to Portland, Maine, should be allowed mileage for the entire distance. In this case, the losing party, the defendant, contended that the allowance of mileage for the witness should be limited to the *State line*.

In *Hathaway vs. Roach*, 2 Woodb. M. 63, Fed. Cas. No. 6213 (1846), mileage was allowed from places of abode of witnesses, although they came from outside the State. In this case, Circuit Judge Woodbury held that he was constrained to so hold under the Act of February 28, 1799 (1 Stat. 626), but, in the absence of such statute, would have held in accordance with the State practice and limited the mileage to the *State line*.

In *United States vs. Sanborn*, 28 Fed. 299 (1886), it was held by Justice Gray and District Judge Colt that mileage should be taxed for *voluntary* witnesses

coming from outside the District and from more than one hundred miles from the place of trial. This case is the leading case in the First Circuit.

It appears from these cases that it has been universally held in the First Circuit that mileage for witnesses should be allowed from their places of abode regardless of District line or 100-mile limit.

## SECOND CIRCUIT

In *Dreskill vs. Parish*, 5 McLean 241, Fed. Cas. No. 4076 (1851), it was held that mileage could not be charged for a witness who had not been served by the Marshal. In 5 Blatchford 134, Fed. Cas. No. 432 (1863), it was held that *traveling fees* for a witness were allowable to the extent to which a subpoena would run—that is, “for any distance within the District, but for not exceeding one hundred miles from the place of trial, unless the distance was wholly within the District.” It is respectfully submitted that a fair construction of the language of the opinion does not tend to establish a one-hundred-mile limit. On the contrary, as we read it, the traveling fees of the witness in question should be allowed for the distance he had traveled to the extent that subpoenas for witnesses would run, but that the allowance should be limited to one hundred miles unless the witness had traveled within the District a distance in excess of one hundred miles.

In *Buffalo Ins. Co. vs. Providence etc. SS. Co.*, 29 Fed. 237 (1886), it was held by Judge Coxe that

the mileage of the witness residing outside of the District should be limited to one hundred miles. It will be noted that Judge Coxe held such hundred-mile limit to be necessary to obviate possible abuses, in that witnesses might be brought from remote parts of the country to testify on immaterial matters and the mileage therefor taxed against the losing party. It is submitted that the *District line limit* would obviate this danger as effectively as the one-hundred-mile limit. It is also true that good faith in subpoenaing of witnesses will be required by the Court in the matter of taxation of costs where the witnesses are subject to service as well as where they appear voluntarily.

In *The Syracuse*, 36 Fed. 830 (1880), it is held, as it was held in 5 Blatchford 134, that the *voluntary* witness in that case was entitled to mileage to the extent that he had necessarily traveled within the District and was not limited to one hundred miles unless the distance that he had traveled within the District was within that limit.

It appears from the cases cited in the Second Circuit that the rule there is to allow mileage for voluntary witnesses for the distance traveled through the territory subject to the process of the Court—that is, the distance necessarily traveled within the District whether that distance be more or less than one hundred miles, as established by the decisions in 5 Blatchford 134 and *The Syracuse*, 36 Fed. 830. By the ruling in *Dreskill vs. Parish*,



by inference, no mileage is allowable to voluntary witnesses, and by the ruling in *Buffalo Ins. Co. vs. Providence etc. SS. Co.*, the mileage of such a witness is allowable to the extent of one hundred miles only.

### THIRD AND FOURTH CIRCUITS

In the cases from the Third and Fourth Circuits (one case from each circuit), it is held that the mileage of the witnesses should be limited to one hundred miles.

### SIXTH CIRCUIT

In the cases in the Sixth Circuit, it is held that mileage should be allowed for one hundred miles. These decisions, however, are based upon the principle that mileage should be allowed for the distance that subpoena would run, and it is again respectfully submitted that in the case of a voluntary witness, whether he be a resident or non-resident of the District, that distance should be limited only to the distance that he has necessarily traveled within the District.

### SEVENTH CIRCUIT

In *Eastman vs. Sherry*, 37 Fed. 844 (1889), it is held that mileage should be limited to one hundred miles; but in the opinion of Judge Jenkins, it is said:

“It seems clear to me that Congress intended to allow mileage only to the extent that the subpoena would run.”

In *Marks vs. Merrill Paper Co.*, 203 Fed. 16, which appears to be the only Circuit Court of Appeals decision upon the question, the allowance of mileage is limited to one hundred miles. The question is not discussed by the Court in that case at any length, and it does not appear whether the witness attended voluntarily or under subpoena.

#### EIGHTH CIRCUIT

In the cases from the Eighth Circuit, the rule seems to be established in that Circuit to allow mileage for voluntary witnesses attending from outside the District for the distance of one hundred miles only.

#### NINTH CIRCUIT

In *Spaulding vs. Tucker*, 2 Sawyer 50, Fed. Cas. No. 13221 (1871), Judge Sawyer held that witnesses who were served with subpoena outside of the District and more than one hundred miles from the Court, are voluntary witnesses, are not in attendance "pursuant to law," and that no mileage should be allowed for such witnesses.

In *Haines vs. McLaughlin*, 29 Fed. 70 (1886), the question again came before Judge Sawyer, sitting with District Judge Sabin, and Judge Sawyer again adhered to his former ruling that a witness not regularly subpoenaed was not in attendance in Court "pursuant to law." In that case, his associate, District Judge Sabin, dissented, adopting the

view of Mr. Justice Gray and Judge Colt, as announced in *United States vs. Sanborn*, 28 Fed. 299 (1886). Apparently, because of this difference of opinion between himself and his associate, Judge Sawyer suggested in the Haines case that, if desired, a certificate of opposition of opinion would be made, and that he hoped the case would be taken up for authoritative decision.

The view expressed by Justice Gray and District Judge Colt in *United States vs. Sanborn*, 28 Fed. 299, was in direct conflict with the earlier decision of Judge Sawyer in *Spaulding vs. Tucker*, 2 Sawyer 50, and was adopted after discussion of the *Spaulding vs. Tucker* case.

In the *Sanborn* case, Justice Gray held that in the phrase in Section 848 of the Revised Statutes "for each day's attendance in Court, or before any officer pursuant to law," the words "pursuant to law" would seem to have been inserted, not to restrict or qualify the effect of "attendance in Court," but rather to limit the attendance "before any officer."

In the *Sanborn* case, Justice Gray further stated:

"But presuming them to apply to both classes of cases, it is only 'attendance pursuant to law,' not 'being summoned pursuant to law,' that is required to entitle a witness to his fees. A witness who, in good faith, comes to Court in obedience to a subpoena, or at the mere request of one of the parties, attends pursuant to law, and while coming, attending and returning, is

privileged from arrest on civil process, even if he comes from abroad and has no writ of protection.”—Citing cases.

This would appear to be the reasonable as well as the grammatical construction of the language employed in Section 848. It clearly provides that a witness shall be paid for his “attendance in Court, or before any officer” who is conducting a hearing pursuant to law.

In *Lillienthal vs. Southern Cal. Ry. Co.*, 61 Fed. 622 (1895), Judge Ross was constrained to follow the ruling of Circuit Court Judge Sawyer, but likewise expressed the hope that the question might be authoritatively settled.

In *Hanchett vs. Humphrey*, 93 Fed. 895 (1899), Judge Hawley held that “voluntary” witnesses were entitled to mileage whether coming from within or without the District, holding that such mileage should be allowed to the full extent “of the distance that could be legally reached by subpoena, viz.: At any place within the District or at any point without the District to the extent of one hundred miles from the place where the Court is held.”

It is again earnestly submitted that the full extent of the distance to which subpoena could have run in the case at bar, over which the witnesses in question necessarily traveled, was the Northern line of the Northern District of California.



In *United States vs. Southern Pacific Co.*, 172 Fed. 909 (1909), Justice Bean held:

“The rule, however, supported by the great weight of authority, is that the prevailing party in a civil action is entitled to charge, as a part of his costs, mileage for a distance necessarily traveled by a witness to attend the trial on his behalf from any place to which a subpoena will run.”

That is, to the limits of the District, and one hundred miles where the limit of the District is less than one hundred miles distant. It is true, however, that notwithstanding the doctrine announced by Judge Bean, allowance was only made by him for mileage of the witness to the extent of one hundred miles.

The authorities upon the question of the allowance of mileage of witnesses, under Section 848, are collated under the footnote “Mileage” under that Section in Volume 7 of *Federal Statutes Annotated*, on pages 1124 and 1125. The true rule, as gathered from all these decisions, is correctly stated in the first authority cited under this footnote, *Hanchett vs. Humphrey*, per Hawley, District Judge, as follows:

“The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the Acts of Congress were intended to, and do, allow mileage to witnesses to the full extent of the distance that could be legally reached by subpoena, viz.: at any place within the District or at any point without the District to the extent of one hundred miles from the place where the Court is held.”

If this is the true rule, then its reasonable application is to allow a witness mileage from the limit of the District if he necessarily and properly traveled that distance.

The "one-hundred-mile rule" seems to have been followed upon two distinct theories. First, that allowance of mileage should be limited to one hundred miles because, beyond that limit, the deposition of the witness might be taken. But upon this theory, there would be no reason for discriminating against a non-resident witness. The deposition of a witness residing in the District at a point more than one hundred miles distant from the place of trial can be taken, as well as the testimony of a non-resident witness, at the option of the party desiring to use the testimony.

The second and latest theory on which the one-hundred-mile limit is apparently based is that service of subpoena does not run for a non-resident witness more than one hundred miles from a place for trial. The only apparent logic for the support of the rule upon this basis would appear to be that mileage is not allowable for any witness who does not come from a point within the jurisdiction of the Court—that is, within the District or outside the District within one hundred miles. The result of such a holding would be that a litigant would be compelled to produce any witnesses beyond these limits at his own expense without any hope of reimbursement. This would be a very unjust rule, and the weight of authority is against it.

The provision of the statute that subpoena shall run out of the District to the extent of one hundred miles, is clearly applicable only to those Districts in which a District Court is located within one hundred miles of an adjoining District, and its intended effect was to extend the process of the Court into the adjoining District to that extent. That being true, there would seem to be no reasonable ground for the application of that provision of the statute to the allowance of mileage for witnesses, except in cases where the witnesses necessarily and properly traveled through this one-hundred-mile limit in an adjoining District to reach the Court.

The reasonableness of the matter, as well as the proper construction of the statutory provisions, would seem to dictate the rule that mileage should be allowed for a witness for the distance that he actually and necessarily traveled within the jurisdiction of the Court.

It appears that a majority of the Courts have adopted the one-hundred-mile limit rule in taxing costs for the mileage of witnesses coming from without the District. But the question is yet an open one in this District.

## **XII. The refusal of the Court to give certain instructions proposed by defendant bearing upon the liability of defendant for the timber cut.**

On pages 156-157 of their brief, counsel for the defendant invite attention to certain instructions

which were refused by the Court, and contend that these instructions should have been given to the jury. All of these refer to specific portions of the timber alleged to have been converted, and we submit that the general principles therein involved were fully covered by the Court's instructions to the jury, and that it was not error for the Court to refuse to give the specific instructions complained of because they separated the facts surrounding the cutting from each particular tract. The Court fully instructed the jury generally as to the liability of the defendant, and we submit that it was not error to refuse to give the instructions asked by the defendant.

### **XIII. The verdict.**

On pages 8, 9 and 260 of their brief, counsel, by very adroit argument, attempt to demonstrate that the verdict of \$51,040.00 was arrived at by the following method of calculation, to-wit:

16,000,000 ft. of timber at \$1 per thousand .....	\$16,000.00
\$1 per thousand feet as profit on 16,000,000 ft. of timber.....	16,000.00
Interest from 1895 to 1912—17 years at 7%, equal to 119% on the stumpage value .....	19,040.00
Total .....	<hr/> \$51,040.00

In order to arrive at this conclusion, counsel have wilfully ignored both the law and the evidence. In the first place, the Court peremptorily instructed



the jury that the defendant, if liable at all, was liable for the manufactured value of the timber taken from the Edgar lands, the Southeast quarter of Section 28, Township 13 North, Range 14 West. The testimony of William Greene (Tr. p. 78) shows that there were 1,557,025 feet board measure cut from this tract of land. In the computation made by counsel for defendant, they totally ignore this instruction of the Court and the amount of the timber taken. The evidence also discloses that this timber, when sawed and manufactured into lumber, was worth \$10 per thousand feet. We therefore find that in their computation, counsel have totally ignored the Court's peremptory instruction. If they do now make such contention, their argument on pages 229-231 of their brief is wholly useless. If the jury ignored the instruction of the Court with respect to the wilfulness of the taking of the lumber from the Edgar lands, then the giving of such instruction was not such an error as to warrant this Court in reversing the judgment. It is equally true, if we are allowed to invade the field of presumption, to say that the jury wholly ignored the Court's instruction respecting interest, and simply determined that the Government had been damaged by the taking to the extent of \$51,040.00. Another error which appears in their computation concerns the \$16,000.00 which counsel say was allowed as profit on the amount of the timber taken. The instruction of the Court told the jury that they should allow interest on the value of the property taken,

and it is indeed a violent presumption to suppose that the jury, in figuring interest (if they did include interest in their verdict), would allow interest on the value of the stumpage at \$1 per thousand and not allow interest on the profit. It is indeed a foolish argument to say that the jury took unto itself the authority to allow interest on only half the sum that the Court instructed them to allow interest on. The computation is further erroneous because the testimony discloses that the total amount of timber taken was 16,303,890 feet board measure. Of this quantity, 1,557,020 feet board measure was taken from the Edgar lands for which the defendant was liable at \$10 per thousand feet, or a total sum of \$15,570.20. We thus see that counsel, to suit their convenience in their computation, have ignored 303,890 feet board measure and have ignored entirely the manufactured value of the timber taken from the Edgar lands. And, again, their computation is erroneous because they only compute interest from the 1st of January, 1895, to the 1st of January, 1912, a period of 17 years. The complainant alleges that the cutting terminated on the 1st of January, 1895. The testimony discloses that the principal part of the cutting was prior to 1891, and counsel devoted 29 pages of their brief (pp. 127-156) in an attempt to convince this Court that the timber in the Big Black-foot country was cut and removed prior to March 3, 1891. Again, we must do violence to presumption if we adopt the computation offered by counsel.

They only compute interest from 1895, whereas, according to their own argument, which finds some support in the evidence, the principal amount of timber was cut prior to March 3, 1891; and if the jury only allowed interest from January 1, 1895, they violated the instruction of the Court, for the Court told them clearly that the Government was entitled to interest from the date of conversion.

Now, let us take the other end of their computation, namely, the date, January 1, 1912, when they ceased to compute interest. This record shows that the case was submitted to the jury on Friday, February 7, 1913. If counsel are right in their calculations, the jury then failed to give the Government interest from January 1, 1912, until February 7, 1913, a year, one month and seven days, which likewise disregarded the instruction of the Court. We thus see that the whole calculation is erroneous and is simply a juggling of figures which have been adopted by counsel without regard to the evidence or the instructions of the Court. We therefore submit that this sum represents the jury's idea of the damage suffered by the Government by reason of the conversion of the timber in question, and it is not for Counsel or the Court to indulge in speculation as to their method of calculation in order to reverse the judgment entered by the Trial Court.

Before closing this already lengthy brief, we desire to comment upon the testimony relative to the cutting on the Northwest quarter of Section 18,

Township 13 North, Range 14 West, known as the Kelly claim. Counsel seemingly make light of the testimony of James M. Boles (Tr. pp. 281-285). We submit that this witness, who resided on lands adjoining the Kelly claim and through whose barnyard the timber was hauled by the employees of this defendant, was better qualified to testify as to the date of the cutting than the prosperous farmers and school directors produced by the defendant and who merely knew the history of this tract of land from having lived in the neighborhood.

We also desire to supplement our statement with reference to the liability of the defendant by calling attention to the testimony of Thomas Hathaway (Tr. p. 236-9), who testified that the arrangements for the sale of the Bonita mill from Fred A. Hammond to George W. Fenwick were made by the witness under instructions and directions given by the defendant, A. B. Hammond.

We respectfully submit that this record discloses that the defendant was accorded a fair and impartial trial, that the instructions of the Court were eminently correct and that the verdict of the jury was proper and should not be disturbed.

Respectfully submitted,

FRANK HALL,  
*Special Assistant to  
the Attorney General.*





5-  
No. 2503

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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**A. B. HAMMOND,**

**Plaintiff in Error,**

**vs.**

**THE UNITED STATES OF AMERICA,**

**Defendant in Error.**

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**Oral Argument of Charles S. Wheeler.**

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Filed this.....day of January, 1916.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

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The James H. Barry Co.  
San Francisco

**Filed**

JAN 17 1916

**F. D. Monckton,**  
**Clerk.**



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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A. B. HAMMOND,	}	No. 2503.
<i>Plaintiff in Error,</i>		
vs.		
THE UNITED STATES OF AMERICA,		
<i>Defendant in Error.</i>		

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ORAL ARGUMENT OF CHARLES S. WHEELER.

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I.

THE HELL GATE TRESPASSES—SYLLABUS OF THE  
ARGUMENT.

1. ALLEGED TRESPASSES VERY ANCIENT.—The complaint charges appellant with having trespassed more than a quarter of a century ago upon two widely separated tracts of Government land in Montana—one on the Hell Gate River, the other on the Blackfoot.

2. APPELLANT NOT GUILTY OF CONVERSION.—The appellant at no time had any part in the taking or



handling of any timber from the Hell Gate tract. So far as the Hell Gate trespass is concerned, there is not even an atom of evidence to justify the verdict.

3. TRESPASSES ON THE HELL GATE BY OTHER PERSONS WERE INNOCENT.—Whatever timber was in fact cut on the Hell Gate was innocently taken by one Fred A. Hammond and by one George W. Fenwick. For 32 years their conduct would have been entirely lawful under repeated decisions of this Court. In 1910 an opinion of the United States Supreme Court, which was delivered in a case where no brief was presented for the timber men, overturned the established rule. By reason of said decision, acts which for 32 years had been innocent and lawful were converted into timber thefts. The case at bar is an outgrowth of that remarkable *ex parte* overturning of the long recognized interpretation of the Act of 1878 which in all justice should have been considered *stare decisis*.

4. INJUSTICE OF GOVERNMENT'S ATTITUDE.—In view of the sanction which the courts had so long given to cutting upon "mineral lands" in Montana, it would have been most inequitable if Fenwick and Fred Hammond, the men who owned the Hell Gate mill and who in fact took this timber, were now called upon to pay to the Government even for stumpage value—not to mention profits and interest.

5. VERDICT UTTERLY WRONG IN MORALS AND IN LAW.—But neither Fenwick nor Fred Hammond who took the timber have been sued. Appellant A. B. Hammond did not own the Hell Gate mill; he did not handle its lumber, and had not even a remote connection with a single act of conversion. Nevertheless, the jury not only held him liable for the stumpage value and the assumed profits on all the lumber taken, but they charged him with \$19,040.00 interest thereon. The verdict would be ridiculous if it were not so outrageous.

*May it please the Court:* The writ of error in this case brings before the Court a judgment in favor of the Government, entered upon a verdict for \$51,040, for timber trespasses alleged to have occurred in the State of Montana. The most recent of these alleged trespasses occurred *more than twenty years ago!* the earliest *more than thirty years ago!*

It is without hesitation that I say to your Honors that I am here in an effort to right an injustice and a wrong. To that end I will lay stress chiefly upon the proposition that there is in this case not one atom of evidence which justifies this verdict against this defendant,—and I measure my words when I make that assertion. The judgment is bad in law, and it is morally wrong.

So that your Honors may the better comprehend the questions involved, I will ask you to picture two rivers in the State of Montana,—one the Hell Gate, and the other the Blackfoot. Along these two streams are the lands upon which the evidence is to be laid. These respective tracts of land are about twenty-five miles apart, one tract being upon the Hell Gate River, and the other upon the Blackfoot River. The circumstances attending the cutting of timber upon these respective tracts are essentially different, and I am forced to consider them one by one.

THE MILL ON THE HELL GATE WAS BUILT BY MONTANA IMPROVEMENT COMPANY.

First, as to this tract upon the Hell Gate River: There, in the year 1885, a corporation known as the Montana Improvement Company, erected a second-hand saw mill; that is to say, this Montana Improvement Company moved the said saw mill from a place called Thompson Falls—a place not in any way involved in this action,—and set it up in this Hell Gate Canyon. The evidence is that prior to its removal from Thompson Falls it was sold to and was thereafter set up for a man named Fred Hammond, who chances to have been—he is now dead—a brother of the defendant A. B. Hammond (Tr., pp. 223-227).

THE NORTHERN PACIFIC RAILROAD CO. CONTROLLED THE SAID MONTANA IMPROVEMENT COMPANY.

In order that your Honors may understand the circumstances you will have to know something of the history of that Montana Improvement Company.

When the Northern Pacific Railroad was in course of construction, the firm of E. L. Bonner & Co. undertook a contract for clearing 250 miles of its right of way in Montana. That firm of E. L. Bonner & Co. was composed of the defendant A. B. Hammond, and of a Mr. Bonner, a Mr. Eddy, and a Mr. Robertson (Tr., pp. 643-50). The firm was appointed, as was the custom in such cases, the agent of the Northern Pacific Railroad to enter upon the public lands and there cut the ties, piling, and bridge tim-

bers necessary for the construction of the railroad and to furnish it with lumber for stations and buildings (Tr., pp. 644-49). In the course of getting out the timber for the construction of this line of railroad, there was naturally a large amount of surplus lumber—when you saw bridge timbers and extra large lumber, a surplus of small lumber is of course left. E. L. Bonner & Co. in consequence had on hand a lot of such surplus lumber at the close of their contract with the railroad.

In the year 1882, the railroad being about completed, a new and totally different contract was entered into—it appears in the record (Tr., pp. 710-719)—between the Northern Pacific Railroad and a new corporation then organized and called the Montana Improvement Company. Under this new contract the Northern Pacific Railroad was to have 51 per cent. of the stock of the Montana Improvement Company. The rest of the stock was divided up among different persons. These stockholders included, among others, the members of the said firm of E. L. Bonner & Co. which had previously held the said lumber contract.

Under this new contract E. L. Bonner & Co. transferred to the Montana Improvement Company all of the mills which the firm had used in supplying the railroad with construction timbers, and it also transferred to the new corporation this surplus lumber which was on hand (Tr., p. 653), and the said Mon-



tana Improvement Company secured the right under this contract to cut upon all of the Montana lands within the Northern Pacific Railroad grant. These lands covered a very large area. It was a corporation of large capital, and undoubtedly it had expectations of doing a very large business in the way of manufacturing and disposing of lumber. The details of the contract are not necessary save these facts: That the Northern Pacific Railroad was the owner of 51 per cent. of the stock; the defendant, A. B. Hammond, was the owner of only one-fifteenth of the stock, and the rest of the stock was owned in various blocks by different individuals

(Tr., pp. 653-714).

#### WHY THE SAID MONTANA IMPROVEMENT COMPANY WENT INTO LIQUIDATION IN THE FALL OF 1885.

Now, it appears that it was expected by the people who organized the Montana Improvement Company that not only would it be able to utilize the timber upon the railroad lands within the Northern Pacific land grant, but that it, the corporation, being a citizen of the State of Montana, would have the additional right to enter upon what was then known as "mineral lands" of the United States and there cut for domestic, mining, agricultural and other permitted uses under the United States statutes, the timber upon these mineral lands (Act of June 3d, 1878).

Although organized in 1883, the Montana Improvement Company did not begin any active operations until 1885, and almost as soon as it began operations

the Government of the United States, in the language of one of the witnesses, "got after them" (Tr., pp. 224-5).

Your Honors will take judicial notice, I assume, of the reported cases showing that suit by the United States was instituted against both the Railroad and the Improvement Company; that a demurrer was successfully interposed in behalf of the Montana Improvement Company, and that subsequently the case was decided in favor of the Northern Pacific Railroad Company. An appeal was taken and the appeal was dismissed (*U. S. v. N. P. Railroad*, 140 U. S., 703, same case in the trial Court, 6 Mont., 361. The record in the trial Court shows that Montana Improvement Company was originally a party and demurred successfully.)

It would appear that it was the contention of the Government in that litigation, *first*, that as to certain *unsurveyed* lands, which were *non-mineral*, the company could not make use of any of the timber, for the reason—so the Government contended—that said Montana Improvement Company claimed under the Northern Pacific Railroad, and that the said railroad company was a tenant in common with the Government (see 6 Mont., 361)—a theory overturned by the decision in that case.

Further, the proposition seems to have been urged as against the Montana Improvement Company that so far as these so-called "mineral lands" were con-

cerned, the holding of 51 per cent. of the stock of the corporation by the railroad company—in other words, a controlling interest—would bring the case within the prohibitive clause of the timber land act of 1878, which timber land act prohibited any railroad company from having the benefit of the act (Tr., p. 698). That seems to have been why the Government “got after” the Montana Improvement Company. There were no charges in the said suits brought by the Government involving moral turpitude. Whatever may have been the moving cause—and the record indicates that the said suit by the Government was the only reason (Tr., p. 698)—whatever may have been the reasons for so doing—the Northern Pacific Railroad Company and all of the other stockholders in Montana Improvement Company, including the defendant Hammond, concluded in the year 1885—shortly after its active operations began—to go out of the business of manufacturing lumber and to wind up and liquidate the affairs of the company.

**THE SALE OF THE HELL GATE MILL BY THE MONTANA  
IMPROVEMENT COMPANY TO FRED HAMMOND IN 1885  
WAS MADE IN GOOD FAITH.**

I wish at this point to impress upon your Honors the fact that there is not the slightest question or inference fairly deducible from this record that this liquidation by the Montana Improvement Company was not inaugurated and conducted in absolute good faith, or that it was not just what it purported to be; namely, an absolute withdrawal of said Company from

any saw mill business, and a winding up and liquidation of its affairs.

Among its properties was unsold lumber in various lumber yards which lumber had come to it from this firm of E. L. Bonner & Company. This lumber is not here involved. There were also various mills, and among these mills was one then situate at Thompson Falls. That mill in the fall of 1885 was moved to and set up in the Hell Gate Canyon. Now, I think it is absolutely clear from the testimony of witnesses on behalf of the Government itself,—I do not ask you to turn to the corroboration by defendant's witnesses,—they too made it very clear (Tr., pp. 667, 656-7)—but it is abundantly clear from the Government's own witnesses that when Fred A. Hammond purchased that mill, the so-called Thompson mill, from the Montana Improvement Company, that as a part of that transaction the mill was to be moved and was moved from Thompson Falls and set up by the Montana Improvement Company in this Hell Gate Canyon and was to be and was delivered over to said Fred Hammond by that corporation in completed form in the fall of 1885 (Tr., pp. 223-227).

At that point the Montana Improvement Company is free from any further connection of any kind with the mill or the cutting on the Hell Gate. That company did not handle the cut of that mill. (Tr., p. 242). At no time during the connection of the Montana Improvement Company with that mill did the defendant A. B. Hammond do the remotest thing to make him liable to the Government for one penny.



**APPELLANT IN NO MANNER CONNECTED WITH FRED  
HAMMOND'S OPERATIONS ON THE HELL GATE.**

Fred Hammond proceeded to cut timber in the winter of 1885-6 upon what at that time were generally considered to be "mineral lands." While the guilt or innocence of his conduct in thus cutting timber is not a matter of legal concern to us here—for appellant was not a party to the cutting—nevertheless, the fact is that Fred Hammond was acting in good faith. This matter I shall deal with later when discussing the cutting by this mill under George W. Fenwick's ownership. Fred Hammond operated this Hell Gate mill so owned by him, during that winter of '85-86 only. I am not touching upon any question that there is any doubt or dispute about; I am taking the undisputed facts in this record (Tr., pp. 227-538).

Fred Hammond cut very little lumber. His mill was shut down during the winter. He was logging and just getting ready in the spring when Fenwick bought him out (Tr., p. 581).

**GEORGE W. FENWICK PURCHASED THE HELL GATE  
MILL FROM FRED HAMMOND IN 1886.**

The evidence is absolutely uncontradicted that in 1886, in the month of May, George W. Fenwick, in good faith, bought this mill that had been erected on the Hell Gate—the same mill erected for Fred Hammond by Montana Improvement Company and which that company had sold to said Fred Hammond

in the course of its said liquidation (Tr., pp. 556-7, 227).

Mr. Fenwick proceeded to cut lumber on the Hell Gate from the spring of 1886 on, and the lands from which he took lumber were during all of that period unsurveyed. They were not surveyed until 1902, and his operations on the Hell Gate ceased early in 1891, and he himself departed in the middle of that year from his Hell Gate property to take another position in another place. While Fenwick was cutting upon the Hell Gate, we know what became not only of every stick of timber cut by him, but also of all that was in the yards when he purchased the said mill. All of the lumber that he bought from F. A. Hammond he sold to Marcus Daly for use in the Anaconda mines. All that Fenwick himself cut, he also sold to Daly (Tr., pp. 243, 544-5). It was all used within the State of Montana. Fenwick was a citizen. If these Hell Gate lands from which Fenwick was cutting were "mineral lands," he had a right to cut that timber for the uses to which it was put, under the Act of June 3, 1878.

**AS CONSTRUED MANY TIMES BY THIS COURT, FENWICK'S CUTTING ON THE HELL GATE WAS LAWFUL UNDER THE ACT OF '78.**

Your Honors have had before you many times the Act of June 3, 1878. This land in the Hell Gate was of the quality that for 32 years prior to 1910 had been supposed to be "mineral land," within the meaning of

that Act of 1878. If it was, he, Fenwick, as I have said, had a right to cut timber from it for the purposes for which it was actually used. The land answered every description that the Secretary of the Interior, Secretary Teller, had laid down in his letter of June 3d, 1882.

“Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but where there are extensive valleys, plains or mountain ranges, and no known minerals exist, the land may be considered and treated as non-mineral.”

*Dec. of Dept. of Interior, Vol. I, p. 698.*

The lands which Fenwick cut over answered the description which your Honors in three several decisions in this very Court of Appeals held that residents of Montana could lawfully cut over, for the reason that they were included in the term “mineral land” as used in the Act of June 3, 1878.

*United States v. Basic Co.*, 121 Fed., 504;

*United States v. Rossi*, 133 Fed., 380;

*United States v. Plowman*, 151 Fed., 1022.

And it answered the description similarly applied to “mineral lands” by the United States Circuit Courts at least as early as 1889.

*United States v. Edwards*, 38 Fed., 812;

*United States v. Richmond Mining Co.*, 40 Fed., 415.

Here, then, was the situation which confronted said George W. Fenwick between 1886 and 1891: The timber upon this land might under the statute be lawfully cut by him, provided the lumber was used for just such purposes as this lumber is shown to have been actually used for (Tr., p. 572). His counsel so advised him (Tr., p. 559). The courts took the same view. If George W. Fenwick were the defendant, and had his case come before your Honors, at any time prior to the 21st day of February, 1910, I would immediately have pointed your Honors to your own decisions, and the clear evidence appearing in this record as to the "mineral" character of this land, as the term was then understood (Tr., pp. 557-559). I would have called your Honors' attention to the fact that you had held repeatedly that land need not be susceptible of being taken up as a mining claim before it could be considered "mineral land" and the timber taken from it, under the statute of June 3, 1878. I would have pointed out the general character of this Hell Gate land as mineral land, as defined by the Secretary of the Interior Teller in his letter of June 30, 1882 (Vol. I, Pub. Land Dec., 697), and as defined by the various trial courts where the question has arisen in the Federal jurisdiction. I would have asked your Honors upon that showing in connection with the rest of the evidence as to mineral character of the country and the actual use made of the lumber,



to hold that this man Fenwick, a citizen, had a perfect right to take every stick of timber that he took.

And if it had been objected that Fenwick did not comply with all of the regulations of the Secretary of the Interior, as to requiring affidavits from the purchasers, and the like, I would have said that every lawful regulation made by the Secretary was complied with by Fenwick; that the language of the statute is that the timber must be "*cut*" under regulations prescribed by the Secretary of the Interior—that every regulation as to the size of the timber and method of cutting had been complied with by Fenwick, and that his only shortcoming, if any, appears to have been that he did not keep certain books which the rules said a timber cutter should keep, and that he did not exact from the vendees of the lumber, affidavits that they would not use the lumber outside of Montana. I would have called your Honors' attention to the fact that so far as the actual cutting and removing of the timber from the land was concerned, all of the governmental regulations were complied with by Fenwick; that hence the cutting was not a conversion when it took place; and that a failure to keep the rules relating to subsequent acts could not transform an innocent and perfectly lawful act into a tortious taking. I would have said that if upon any theory Fenwick could have been held liable for a failure to comply with the regulations as to what he should do with the lumber after he had cut and taken the trees

away from the Government land, such liability must rest upon a different cause of action than conversion—assumpsit, for instance, but not conversion.

THE RULINGS OF THIS COURT WERE UPSET IN 1910 BY  
THE UNITED STATES SUPREME COURT.

All of these defenses I could have urged successfully in Fenwick's behalf if he had been sued by the Government at any time within the twenty-four years prior to February, 1910. But this defense would have availed nothing for him after that date, because on the 21st day of February, 1910, the Supreme Court of the United States rendered a sweeping decision in the case of *U. S. v. Plowman*, 216 U. S., p. 372, in which every one of the numerous decisions of this Court and of the Court of Appeals for the Eighth Circuit and of every Federal Court which had theretofore construed the Act of 1878 were completely swept aside.

By that decision, men situated as was Fenwick and who had acted in good faith and in accordance with the rulings of this Court and of other distinguished courts—decisions which had stood unchanged for a period of over 30 years—became, in the parlance of the day, mere "timber thieves."

The pity of it is that in that case—which gives birth to such injustice—there was not even an appearance nor a brief for the man who cut the timber. Counsel for the Government had it all his own way (*U. S. v. Plowman*, 216 U. S., 372).

Had Mr. Fenwick been sued in this action for the timber he took—if he instead of Mr. Hammond were

the defendant—the claim, in view of this long line of decisions referred to, would have been morally unjustifiable on the part of the Government. The doctrine of *stare decisis* should apply in cases where for 30 years the decisions of the Federal Courts construing a Federal statute and declaring certain acts to be lawful have been uniform.

But be that as it may, I am not here defending Mr. Fenwick. A. B. Hammond is not George W. Fenwick, and the question naturally will arise in your minds:

Upon what possible theory has A. B. Hammond been held guilty of Fenwick's acts?

All of this timber was cut by Fenwick. There is not one jot or tittle in this evidence to suggest that A. B. Hammond had any interest with Fenwick in this mill. There is not one suggestion in the whole evidence from which the fair inference can be drawn that he ever handled a log or touched a stick of this timber; or that he ever gave any directions in regard to it; or that he ever received, directly or indirectly, the profits of any of it. The evidence, so far as the operation of the mill is concerned, shows that A. B. Hammond was upon the property on but a very few occasions in his whole life. His presence there occasionally during the construction of the mill by the Montana Improvement Company, was before the cutting complained of had begun. It was before Fred Hammond took the mill by purchase from that com-

pany. On one of these occasions he told a fifteen-year-old boy that the boy was too young to drive a wagon—so the boy—now a man of forty-five—says. It further appears that appellant twice went over to the mill during Fenwick's ownership to see his sister, who was George W. Fenwick's wife. He once told a man that he had recommended him as a logger to Mr. Fenwick. It also appears that he sent another man to another mill, called the Wallace Mill, to apply for work. There being no work there, he was sent from the Wallace Mill to Mr. Fenwick's mill and there obtained work.

These are the only fragments of evidence that connect A. B. Hammond with this whole transaction upon the Hell Gate.

Mr. Hammond testifies:

"When Fred A. Hammond sold to George W. Fenwick, I did not, either directly or indirectly, acquire any interest in the mill, business, or property that G. W. Fenwick thus acquired. I did not ever individually at any time own any interest . . . in the Bonita property with Henry Hammond or Fred A. Hammond or George W. Fenwick. . . . I did not at any time ever participate in any of the profits of the Bonita Mill or property while the same was being operated by George W. Fenwick or Fred A. Hammond, or at any other time.

"The Missoula Mercantile Company was never at any time interested in either of these companies or in the profits derived from the conduct of the business there. The Blackfoot Milling and Manufacturing Company was never at any time interested in the business of the Bonita Mill, either while owned by Fred A. Hammond or George W. Fenwick, or at any other time. The Big Blackfoot Milling Company was never at any time interested in the property or profits of said mill under said management, or at any other time" (Tr., pp. 657-8).



## Mr. Fenwick testifies:

"Q. Did Mr. A. B. Hammond have any interest, either directly or indirectly, in your purchase of the Bonita Mill?

"A. Not one cent; either directly or indirectly; nor did Mr. Eddy; nor did the Missoula Mercantile Company; nor did anybody else, either directly or indirectly. He had no interest whatever. The matter was a strictly private arrangement between Fred Hammond and myself.

"None of the profits of that business went to any other person than myself. Neither Fred Hammond nor A. B. Hammond at any time shared in my profits; nor did the Missoula Mercantile Company, nor the Montana Improvement Company have any interest in my profits. . . .

"While I was operating the mill at Bonita, I did not sell any lumber to the Missoula Mercantile Company. Mr. A. B. Hammond did not, nor did any firm or corporation with which he was connected, purchase any lumber from me at any time while I was operating the Bonita Mill" (Tr., pp. 556-7, 568).

## THE THEORY OF THE COMPLAINT COMPLETELY REFUTED.

The complaint in its original form reads:

"That said defendant in committing the said acts in this paragraph last named acted as the General Manager in charge of and directing all of the business of a certain corporation . . . known as the Montana Improvement Company, Ltd., and a corporation known as the Blackfoot Milling and Manufacturing Company" (Tr., p. 3).

During the trial this allegation was amended by adding to the foregoing allegation the words "Missoula Mercantile Company" and "Big Blackfoot Milling Company" (Tr., p. 61).

The allegation in the complaint as amended is that these trespasses were committed by A. B. Hammond while he was the manager and in control of four cor-

porations: 1, The Montana Improvement Company; 2, The Blackfoot Milling & Manufacturing Company; 3, The Big Blackfoot Milling Company, and 4, The Missoula Mercantile Company.

I have already dealt with the relation of the Montana Improvement Company to this transaction, and have shown that it had nothing to do with the cutting done by this mill on the Hell Gate. That eliminates the first element in the charges against the defendant so far as the Hell Gate is concerned.

It is not here contended that the big Blackfoot Milling Company ever had anything whatever to do with the Hell Gate. That eliminates a second charge; nor is it contended that the Blackfoot Milling & Manufacturing Company ever had anything whatever to do with any trespasses on the Hell Gate. That eliminates the third element in the four charges in the complaint, and leaves only the Missoula Mercantile Company to be considered.

If the Missoula Mercantile Company was not responsible for Fenwick's trespasses, then appellant, whose only relation to the corporation is that of stockholder and director, is of course not liable. Here again I must go a little bit into the history of the company.

THE MISSOULA MERCANTILE COMPANY HAD NO PART  
IN FENWICK'S CUTTING.

In 1876 a firm called Eddy, Hammond & Company was organized for the purpose of conducting a general merchandise business in the then little town of Missoula, Montana. Its business was with trappers, and Indians, and traders, and farmers, and lumbermen, and others who were building up that pioneer portion of our country. Coin was scarce; banking facilities were almost unknown, and the result was that the little establishment was used as a bank by the traders, trappers, lumbermen, and farmers. If A owed money to B, he would give an order on Eddy, Hammond & Company, who would charge it to A, and credit it to B. So universal was this practice, that these transactions came to be called "Bitter Root turns" (Tr., pp. 641-3). In the course of these transactions a farmer from the Bitter Root Valley, for instance, would be given credit by Eddy, Hammond & Company and his account would be carried, and after a while he would pay off his account. And so, too, with hunters and trappers; and so with mill men, and so, too, with contractors connected with the building of the Northern Pacific Railroad. It was the general course of the business of Eddy, Hammond & Company to extend credit to customers. From 1876 to 1885 that business continued to be conducted under the name of Eddy, Hammond & Company. The partnership was a totally different con-

cern from the firm of E. L. Bonner & Company—the Northern Pacific contractors (Tr., pp. 643-649). The members were different. One Robertson was not a member of the firm of Eddy, Hammond & Company, but said Robertson, together with Eddy, Hammond, and Bonner were the members of the said contracting firm of E. L. Bonner & Company.

Such was the business of Eddy, Hammond & Company in 1885, when the Missoula Mercantile Company was organized. Eddy, Hammond & Company transferred all of its business to the new corporation, and from that day to this the Missoula Mercantile Company has proceeded with its business until to-day it is one of the greatest business corporations of the Northwest, with a capital of upwards of a million dollars.

The defendant Hammond in 1885 became and has since continued to be a stockholder in the Missoula Mercantile Company, owning about one-third of the stock. At no time during the period in controversy did appellant ever own more than one-third of its stock. It has never dealt in lumber.

“The Missoula Mercantile Company never dealt in lumber; it never owned any sawmills, nor did it ever own any stock in any corporation interested in sawmills” (Testimony of A. B. Hammond, Tr., p. 643).

There have been at all times divers other stockholders holding various numbers of shares. The *bona fides* of the corporation is not questioned. De-



fendant A. B. Hammond has at no time owned the control of it. Mr. Fenwick while he was operating the Hell Gate mill was a customer of the Missoula Mercantile Company. That is as near as defendant A. B. Hammond comes to having any relation with Fenwick's mill.

**FENWICK MERELY A CUSTOMER OF THE MISSOULA  
MERCANTILE COMPANY.**

Fenwick had a store at Bonita in connection with his mill. He bought his goods of the Missoula Mercantile Company, and he paid for them. In company with other mills, Fenwick's mill maintained an office in Missoula which was located in or near the building or store of the Missoula Mercantile Company. This office served as a clearing house for these various mills. From there they sent out invoices; there they received their money, and transacted some of their business. The expenses of the office were paid, not by the Missoula Mercantile Company, but by the different mill men. It was something totally different and distinct from the Missoula Mercantile Company. There is nothing to justify any inference that it was a part and parcel of the Missoula Mercantile Company. The evidence is just the contrary.

Fenwick had generally a large credit balance with the Missoula Mercantile Company. When he had a debit balance he paid interest to the Missoula Mer-

cantile Company; when he had a credit, they paid him interest (Tr., p. 569). He was residing at his mill away off in the woods. There was no postoffice at his mill. He would give an order or check to a laborer on the Missoula Mercantile Company. Perhaps the man would buy goods with it, and in that way the order would be taken up. Perhaps the man would receive money. The goods or the money would be charged against Fenwick's account. This course of business—this banking—this method of doing business—was carried on for Fenwick by the Missoula Mercantile Company, just as it was for farmers, contractors, trappers, and Indian traders. Some of the latter traded as far North as the British line.

A. B. Hammond owned one-third of the stock in the Missoula Mercantile Company—no more. Is there any principle of law which would make the Missoula Mercantile Company liable for a conversion committed by these trappers, traders, farmers, or lumber mills men? And is there any principle of law which holds a stockholder in a corporation liable for conversion because the corporation in which he holds stock has sold goods to and carried the account of a man who in the course of conducting a farm or a lumber mill commits an innocent trespass upon Government land?

That is this case—and if the Government had sued the Missoula Mercantile Company instead of A. B. Hammond, it could not have recovered judgment. If the corporation is not liable, it is obvious that

neither its directors nor its stockholders would be liable as such.

If, then, A. B. Hammond is to be held responsible for the timber which Fenwick cut on the Hell Gate, it must be for a better reason than is afforded by the circumstance that Fenwick traded at the Missoula Mercantile Company's store.

#### MISSOULA MERCANTILE COMPANY NOT AN AGENCY OF APPELLANT.

A. B. Hammond was a director of this Missoula Mercantile Company. There is no suggestion in the evidence that the corporation at any time was merely his agency. On the contrary, he was one of its agents. He did not even own the control of the corporation. The complaint itself says that he was the manager. He was a mere agent like any other director. Like any other agent, if he had in the course of his agency trespassed upon public lands and converted timber, he would like any other agent who actively participates in a tort, have been personally liable for conversion. But he did nothing of the sort. He did not touch it. He did not direct the taking or the cutting of a single stick of it. He had nothing to do with the sale or with the use made of it after it was sold. He had no directing hand with regard to it. And how are you going to hold him guilty of a conversion, in view of the fact that he took no part in the conversion? To do so will abrogate every principle of law.

I read from *Folwell v. Miller*, 145 Fed., 495-6:

"That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition which does not require extended discussion. The president of the corporation is an agent of very ex-

tensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are the directors or stockholders, for torts committed by the corporation, **in the absence of personal participation in the tortious act.** As an agent, he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employes. *Bath v. Caton*, 37 Mich., 199; *Paper Co. v. Dean*, 123 Mass., 267; *Brown v. Lent*, 20 Vt., 529; *Murray v. Usher*, 117 N. Y., 542, 23 N. E., 564; *Nat. Cash. Reg. Co. v. Leland*, 94 Fed., 502, 37 C. C. A., 372; *Arthur Griswold*, 55 N. Y., 400."

*Folwell v. Miller, supra.*

I have now given to your Honors the facts in connection with the operations on the Hell Gate.

## II.

### THE BLACKFOOT TRESPASSES—SYLLABUS OF THE ARGUMENT.

1. HISTORY OF THE MILL ON THE BLACKFOOT.—One Henry Hammond built and owned this mill from 1885 to 1888. He sold it in 1888 to the Blackfoot Milling & Manufacturing Company. That corporation in 1891 sold out to the Big Blackfoot Milling Company. All of the stock of the latter corporation was sold in 1895 to the Anaconda Mining Company. The only relation of appellant A. B. Hammond to the enterprise is that he owned one-fifth of the stock and until 1895 was on the Board of Directors.

2. AN ENORMOUS AREA CUT OVER BY THE BLACKFOOT MILL.—Under the personal management and direction of Henry Hammond the Blackfoot Mill logged over an area 75 miles long by three or four wide. The proofs of timber trespasses of any consequence on Government lands narrow down to three parcels—one of 40, one of 80, and one of 120 acres.



3. APPELLANT IN NO MANNER CONNECTED WITH BLACKFOOT TRESPASSES.—These three trespasses were all accidental.

(a) The first was committed while Henry Hammond owned the mill. He bought and took the timber on said 160 acres from a homesteader who had commuted his entry and who in good faith had paid the Government for the lands;

(b) The second was committed while said Henry Hammond leased said mill from the Blackfoot Milling and Manufacturing Company and was operating it on his own account. Contractors who had a logging contract with Henry Hammond, inadvertently cut over the lines and took timber from less than 80 acres of Government land.

(c) The third was committed while the Big Blackfoot Milling Company had a permit from the Government to cut timber on some 11,000 acres. Among the lands petitioned for and supposed by the corporation to be embodied in the permit was a certain 40 acres. There was no reason on earth why the permit should not have covered it. It covered all the lands surrounding it. Obviously, through a clerical error it was omitted. Although the company cut over these 40 acres, it turned back to the Government, uncut, thousands of acres embraced in the permit. This shows how utterly purposeless and innocent the trespass was.

4. NO PLAN OR INTENT TO STEAL TIMBER.—The foregoing are the only trespasses of any consequence committed on the Blackfoot. Appellant A. B. Hammond was as guiltless in law and as ignorant in fact of these trespasses as was the President of the United States himself. The charge that a company which had lawfully cut over this gigantic area, deliberately planned and schemed to steal the timber on this petty acreage is utterly silly.

5. APPELLANT NOT LIABLE FOR THE ACTS OF OTHER PERSONS.—Henry Hammond may in law be liable for what timber he innocently took, but appellant is

not responsible for Henry Hammond's acts. The lumber company may be liable for what it innocently took, but no mere stockholder is liable, nor is any director or other agent of the corporation liable, unless he has actually participated in the acts of conversion. A. B. Hammond was a director of the company, but was not on the ground, had no personal knowledge of the trespasses, was not a joint *tort feasor*, and hence, is not liable for any trespasses committed by the corporation.

Now I wish to turn your attention to the Blackfoot River. There is no more excuse for holding Mr. Hammond liable there than there was on the Hell Gate. These lands on the Blackfoot, unlike those on the Hell Gate, were not "mineral lands" and were not supposed to be. They were lands that had been surveyed. The alternate sections belonged not to the Government, but to the Northern Pacific Railroad Company.

I desire to emphasize the fact that for fully twenty years one Henry Hammond,—not my client A. B. Hammond—first for himself, and later on as the lessee of the Blackfoot Milling and Manufacturing Company, logged upon the said Blackfoot River. In the course of that time Henry Hammond cut—or the companies of which he was the manager—cut under his direction for a distance of seventy-five miles up that river. When you compare that vast territory thus cut over with the petty acreage alleged to have been trespassed upon, your Honors should be moved to view with scorn the suggestion in the complaint that A. B. Hammond took this com-

paratively petty number of trees pursuant to a plan to steal timber from the Government lands entered into while he was in control of these various corporations, and while acting as their manager. At no time did he have the management or control of any corporation cutting timber on the Blackfoot. At no time did he direct the cutting of timber thereon. At no time was any trespass committed on Government land pursuant to any plan whatsoever, or otherwise than by innocent accident.

Here are the circumstances:

Among the activities contemplated by the same Montana Improvement Company already considered by us, it had had its eye upon the Blackfoot, where the Railroad owned the alternate sections, which it had a contract to cut. It had attempted to construct a dam soon after its organization in 1883, but in the winter or spring of '84 that dam went out. The remnants of the dam were there when that company went into liquidation, and in 1885 those remnants of the dam and whatever rights it had at the damsite were sold for \$300.00 to Henry Hammond. The bill of sale, the instrument of transfer, appears in the record (Tr., p. 429).

Henry Hammond was a man of independent means. He was a brother of the defendant A. B. Hammond. He was not associated with appellant in business, but had been engaged in contracting prior to 1884 in the State of Washington on his own account (Tr., p.

~~481~~). In addition, he had the backing of one Marcus Daly, who advanced him as much as \$50,000 at a time to help him in his operations on the Blackfoot (Tr., p. ~~485~~). There is no question or suggestion in the evidence that Henry Hammond did not buy that Blackfoot property in good faith, that he did not as the owner thereof build the mill and operate the same from 1885 to 1888 (Tr., pp. 429-434). Of this there is not one particle of doubt.

**THE BLACKFOOT MILLING AND MANUFACTURING COMPANY BOUGHT THE BLACKFOOT MILL IN 1888.**

In 1888 the Blackfoot Milling & Manufacturing Company was organized. It was not organized merely to take over that mill from Henry Hammond, but it took over various properties in various places in Montana (Tr., p. 660). It appears to have had a large capital. It operated flour mills, and stores, as well as lumber mills; it also had other lumber mills in the Bitter Root Valley.

Henry Hammond received for his interest, for his property on the Blackfoot, 25% of the stock of this new corporation. A. B. Hammond, along with divers other persons—not by any means identical with the stockholders in the Missoula Mercantile Company at that time, and not identical with those in the Montana Improvement Company—A. B. Hammond, along with others, were the stockholders in the Blackfoot Milling & Manufacturing Company, and said A. B. Hammond owned about 20% of the stock (Tr., p.



661). As a part of the consideration for his transfer of the Blackfoot mill to the new corporation, it was provided that Henry Hammond should operate the mill under a lease—for which he paid rent—from the Blackfoot Milling & Manufacturing Company for some three years, with the privilege of extension (Tr., p. 434).

**BIG BLACKFOOT MILLING COMPANY ACQUIRED THE  
MILL IN 1891.**

The evidence is absolutely without contradiction that until 1891, Henry Hammond continued to operate that mill under this lease. He was his own manager under his lease. In 1891 after the expiration of his lease, he managed the property for the Big Blackfoot Milling Company, a corporation which had succeeded to the property and business of the Blackfoot Milling & Manufacturing Company. The evidence shows that he paid rent during his lease (Tr., p. 439); that he himself handled his lumber, and there can be no question upon that point.

**Henry Hammond testified:**

“Mr. A. B. Hammond never at any time had, either directly or indirectly, in my name any interest in either the Big Blackfoot Milling Company or the Blackfoot Milling and Manufacturing Company. He never directly or indirectly at any time had any interest in the one-quarter, or thereabouts, which I say I owned. He never at any time either directly or indirectly had any share or interest in the profits of the business which may have been earned during the time that I was operating it individually or during the time that I was operating it as a lessee. Mr. A. B. Hammond had nothing to do with the making of

any contract for the sale of lumber or timber of the Big Blackfoot Milling Company during the years that I was president of the company. Mr. A. B. Hammond had nothing to do with the business while I was conducting it for myself upon the Blackfoot. He had nothing whatever to do with it while I was conducting it as a lessee. While I was conducting the business as president and manager at Bonner for the Big Blackfoot Milling Company, A. B. Hammond had nothing to do with the management of it any more than any other stockholder" (Tr., p. 442).

It appears that the Blackfoot Milling & Manufacturing Company having these varied interests in flour mills, stores, and lumber mills—among which was this Blackfoot mill—was desirous in 1891 of issuing preferred stock, with the result that for purposes of convenience the Big Blackfoot Milling Company was organized, and to that corporation the first company transferred all of its assets, including this lumber mill on the Blackfoot. It was but a continuation in another form of this Blackfoot Milling & Manufacturing Company. Henry Hammond's lease expired. This new corporation operated the Blackfoot mill thereafter on its own account with Henry Hammond as its manager.

#### ONLY THREE SMALL PARCELS ON THE BLACKFOOT WERE TRESPASSED UPON.

While I am on the subject of the Big Blackfoot Milling Company, I should say that in 1895 all of the then stockholders thereof, including the appellant, sold out their stock to the Anaconda company, and since then the Anaconda company has been in control of the said lumber company. The new stock-

holder has continued its existence. The operations have continued on the Blackfoot so that all of the parties that I have mentioned in the course of this argument, with the exception perhaps of Marcus Daly, passed out of any relation with the Blackfoot Company in 1895. But that corporation lives and is in business in Montana and it has not been sued!

Now, as to the question of trespasses on the Blackfoot: there is not a suggestion of moral turpitude in connection with any of them. I am not confronted with a case where I must try to palliate or excuse a wilful trespass. Whatever has been done has been done innocently, and whether Henry Hammond or any other person is liable, the liability arises out of an innocent trespass only.

#### THE EDGAR TRESPASS.

Only three trespasses of any consequence are shown in the evidence. The first was committed in 1885 by Henry Hammond. *Appellant A. B. Hammond had no part whatever in it* (Tr., p. 444). In the fall of that year a man named Edgar filed a homestead claim on 160 acres of land. Edgar was a man who had lived for upwards of twenty years in Montana (Tr., p. 416). He was a man of family. He settled with his family on that 160 acres. He had 20 cows, and grew vegetables on the land then filed upon by him; he supplied milk and vegetables to the mill crews who were working in

the immediate vicinity. His land though timbered was good agricultural land. Enough work was done by that man to have entitled him during the three or four years that he lived on the property to commute the homestead and buy the land. It is rare indeed that such a good showing is made of actual work upon his claim by a homesteader as we have upon the Edgar claim. Henry Hammond bought some logs from that man in 1885, while he was clearing his ground. At that time Henry Hammond alone owned that Blackfoot mill. In 1886 or 1887 Henry Hammond also bought and paid for other logs upon this same homestead claim (Tr., pp. 444-447). They were cut from Edgar's homestead claim and taken to the mill.

This man who was in fact a *bona fide* settler paid the full amount to commute his homestead. The Government took his money, but the amount was long thereafter returned to him. Why? After holding the money a long time, the Government returned it because Edgar had not made proper proof of his citizenship (Tr., p. 446). The evidence is that the courthouse of another State, where he had filed his declaration, had been burned and its records destroyed (Tr., p. 415). Subsequently, Edgar appears to have given up the hope of proving up on the claim, and his homestead entry was canceled. And now Henry Hammond, who purchased from him while his claim was apparently indubitable, is probably tech-



nically liable to the Government for the timber he bought from this man Edgar. But that does not mean that A. B. Hammond, who knew nothing of the transaction, who is not shown to have had the slightest connection with it, is liable to the Government for what his brother took. His brother was in business for himself, and Mr. A. B. Hammond, neither in morals nor in law, was his brother's keeper to any such extent.

#### THE BOYD TRESPASS.

Next as to the 80-acre trespass. This is known in the record as the "Boyd Trespass" (Tr., pp. 526-527).

The evidence is absolutely clear that the loggers in the woods for Henry Hammond and for the Big Blackfoot Milling Company were told to respect with the utmost care the Government lines, and not to cut over them (Tr., pp. 529-530). When after twenty-odd years have passed and when an area 75 miles long by three or four wide has been cut over, does not the circumstance that only three petty errors were made demonstrate to your Honors' entire satisfaction that nobody concerned in this transaction intended in these few instances to wrong the Government?

At any rate, the testimony of the Government's own witnesses is that they were warned not to go over the lines. There was some mistake; the contractor who had the contract to cut the timber on lands which belonged to that company got over the line and committed the Boyd trespass. For that error A. B. Hammond is held responsible by this verdict. He was utterly ignorant of it. His only possible connection with it

is that he was a stockholder and director of the Big Black-foot Milling Company.

I can understand that circumstances might arise where some arch villain would organize a corporation as a cloak, that he might hide behind it, and go upon Government land and steal timber. But where is the law that a stockholder or a director of a *bona fide* corporation—a man who is only one of a board of several directors—who has no personal connection or contact with any cutting that is done, who does not touch the timber that is taken, where he has not even set his foot upon the land, and is utterly ignorant of the fact that the particular land is being cut over—where is the law that makes him—a mere director and stockholder—liable for any trespass or conversion which the corporation innocently commits? His is the liability of any other agent. If he knowingly aids the corporation in trespassing, if he directs it, if in short, he is a joint tort feasor, he is liable like any agent or employe who participates personally in a tort. But in any other case of conversion by the corporation his liability is only that of an employe or other agent. He becomes liable only where his own acts enter into the unlawful taking.

*Folwell v. Miller*, 145 Fed., 496.

## THE "PERMIT" TRESPASS.

But one other alleged trespass remains to be considered. While the Big Blackfoot Milling Company was operating this property, it obtained from the United States Government, pursuant to the Act of 1891, through the Secretary of the Interior, a permit to cut upon some 11,000 acres of timber land (Tr., p. 462). Timber which the Company could cut under that permit did not cost the company a penny. The company was merely required while cutting to comply with the rules and regulations of the Interior Department. Among the lands so sought by the company was a certain forty, or perhaps it was eighty, acres of land. The company asked for both the north half *and* the southwest quarter of a section 18 (Tr., p. 453, 4th line). In the permit granted to said company there were many errors. It was even given the permission to cut over something like 1,000 acres that it had not asked for at all. And in the course of writing out the permit, this forty or eighty acres of land,—almost completely surrounded by other lands as to which the permit was granted,—was omitted, through what obviously was a clerical error. It appears that instead of granting the right to cut the north half and the southwest quarter the permit describes the land as the north half *of* the southwest quarter (Tr., p. 463, middle). The description in the permit was very long; the company thought it got what it had asked for. It cut that forty or eighty

acres. It did not cut thousands of acres included in the permit which it could have had for nothing. It was not required to pay one cent for what it cut. But now because that company cut that forty acres, the Government now sues this appellant! A. B. Hammond knew nothing of the fact that any trespass was being committed. He was never on this whole Black-foot property but twice in the whole twenty years that is here covered—once in 1886 to look at a log drive—a matter of interest and curiosity—and the second time when he went on a fishing trip two or three years later. He had nothing personally to do with these lands. He bore no relation whatever to the cutting on any particular section of land. A corporation in which he held one-fifth of the stock, under an entirely innocent, natural and altogether excusable mistake, cut over that small piece of land, *and A. B. Hammond is held liable therefor by this outrageous verdict as if he were a trespasser and a timber thief!*

I have now fairly, though hastily, reviewed the conspicuous and determinative facts.

I hope that the decision of this Appeal is to go upon broad grounds. It is not just, that in the twilight period of his life, one of the upbuilders of the Commonwealth should find his name stained by the suggestion in this complaint and verdict that he consciously and corruptly planned and designedly proceeded to steal from his country.

I hope that this Court will feel moved to reverse this case upon the merits. I am most reluctant to turn for protection to technical rules of law. Nevertheless, while deeply conscious of the merits of the



case, there are certain rules of law, which in any event entitle my client to a reversal of this judgment, and which therefore I feel it my duty to bring forward.

### III.

#### THE STATUTE OF 1891 IS A COMPLETE DEFENSE— SYLLABUS OF THE ARGUMENT.

1. On March 3, 1891, Congress passed an act which declares that in any civil action brought by the United States for trespass upon timber lands in Montana, it shall be a defense if the timber was cut by a citizen of the United States for use in Montana for mining, agricultural, manufacturing or domestic purposes.

2. Said Act operates as a release, waiver or condonation of the offense. The timber in question was cut by citizens and was used in Montana. The said Act of Congress is therefore a complete defense.

3. A separate Act amendatory of the foregoing Act became a law upon the same day that it did. Said amendment provided that the timber taken must have been cut under rules and regulations of the Secretary of the Interior. But the first Act, which contained no such requirement, was in force for an appreciable length of time, otherwise it could not have been amended. If in force for even a fraction of a day, it operated as a waiver, release or condonation by the Government.

4. Moreover, the amendatory Act also condoned all past offenses. It was prospective, insofar as it referred to cutting under rules and regulations prescribed by the Secretary of the Interior. This proviso had no reference to past offenses. Prior to that time there had been no rules or regulations covering lands of the class here involved. Therefore, measured by the Amendatory Act, the trespasses have been condoned by the Government.

In the first place, if A. B. Hammond had been guilty of everything that is here charged against him, the Government has acquitted him by the statute of 1891, and the Court should have instructed the jury, as requested, to bring in a verdict for the defendant. This statute was pleaded as a defense. It was passed on the 3d day of March, 1891. It provides in Section 8, that in the State of Montana, and the other States mentioned therein, in any civil action by the United States for a trespass on public timber lands . . . "it shall be a defense if the defendant shall show that "the said timber was so cut or removed from the timber lands for use in such State or Territory or by a "resident thereof for agricultural, mining, manufacturing or domestic purposes," and has not been transported out of the State.

We proved in this case that every foot of this timber which was cut was cut by a resident—the corporations were residents and so were Henry Hammond, F. A. Hammond and G. W. Fenwick—and that it had been used within the State of Montana for one or more of the purposes indicated. Nothing further would need to be said to acquit my client, were it not for the peculiar circumstance, that on the same day that that Act of Congress became a law, a separate bill, which amended that Act, was rushed through Congress. This amendatory bill declared that "it "shall be a defense if the defendant shall show that "the timber so taken . . . was cut or removed

“ . . . under rules and regulations made and prescribed by the Secretary of the Interior.” This language was merely prospective. The first Act had acquitted and buried the past. This I insist was the legal effect of the two Acts. This at least is true: the one Act, being an amendatory Act—amendatory of another Act passed on the same day—it follows that for some appreciable interval of time it was the law duly declared by the Government of the United States that the facts which appear in the case at bar constitute a perfect defense.

When an offense has been released, whether the release comes from me to another private individual, or by my Government to me, that release is final, and it makes no difference that at a later date the attempt is made to withdraw that release. This offense was condoned as a matter of law. It could not be revived by the amendment. Thus through this Act we have good conscience and equity meeting, and the outrageous, harsh and inequitable results that would follow upon the decision of the United States Supreme Court which in 1910 upset all previous conceptions of the Act of June 3, 1878, will happily be avoided, and the judges will not be called upon to insist that that shall be done which is right only in the letter of the law, but is contrary to the spirit of justice.

THERE WERE NO RULES REGULATING THE CUTTING—  
HENCE NO VIOLATION, AND CONDONATION COM-  
PLETE.

But the result is not changed even if we are compelled to rely for our defense upon the amendatory act. *For at no time between 1885 and 1891 were any rules or regulations whatever prescribed by the Secretary as to the cutting of timber upon lands of the character here involved.* If there were none, there could be nothing wrong in not obeying rules.

There were rules and regulations as to "mineral lands." But we now know that the lands on the Hell Gate were not "mineral lands," although they were believed to be until the U. S. Supreme Court decided the *Plowman Case* in 1910. We now know that they were just ordinary timber lands, and that nobody during all of that period could lawfully cut upon them. Therefore no rules and regulations of the Secretary ever applied to them.

We also know that the lands on the Blackfoot were likewise just ordinary timber lands and that no rules ever promulgated by the Secretary prior to 1891, attempted to give any authority to cut on them.

We have, then, a case where the cutting has been done and where no rules have ever been prescribed by the Secretary which touch the case. It cannot be doubted but that this Act was intended to cover past trespasses as well as to prescribe a rule for the future. For the future, the Secretary could under the Act



grant timber permits in cases where he never had that power before. For the future, he could prescribe rules and regulations under which the timber could be cut. But so far as the past was concerned, there never had been any rules prescribed as to lands not mineral and the Act necessarily operated to condone all such trespasses absolutely.

If this is not so, then it can only be because the Act is to be held by this Court not to be retroactive. But obviously it was intended to relate to all cases. It was a statute of repose intended to put an end to these questions which were a legacy from the pioneer days of the Western territories.

**JUDICIAL CONSTRUCTION OF THE ACT OF MARCH 3, 1891, FAVORS OUR CONTENTION THAT IT CONDONED ALL PAST OFFENSES.**

Only once has that statute come before the Supreme Court of the United States. This was in the case of *Northern Pacific Railroad Co. v. Lewis*, 162 U. S., 366, 377. It appears that about one year before the Act was passed one Lewis had cut and piled on Government land ten thousand cords of ties. He sued the Northern Pacific Railroad for burning the ties up. The defense of the company was that the wood did not belong to him; that he had stolen it from the Government's lands, and that it was on Government land at the time it was burned.

Lewis attempted to show that he had a title, by invoking the Act of 1891, but he did not show that he

was a resident or that the timber was cut for an authorized purpose. The Court said:

"Nor did the plaintiffs obtain any rights under section 8 of the laws of Congress, approved March 3, 1891, c. 561, entitled 'An act to repeal timber culture law and for other purposes.' 26 Stat., 1095. That section was amended by the act approved on the same day, March 3, 1891, c. 559, *ibid.* 1093. Neither section grants any relief to one situated like the plaintiffs. The section in either act looks to a criminal prosecution or civil action by the United States for trespass upon public timber lands to recover for the timber and lumber cut thereon, and it is provided that it should be a defence if the defendant should show that the timber was so cut or removed by a resident of the State or Territory for agricultural, mining, manufacturing or domestic purposes, and had not been transported out of the same. *If the plaintiffs had shown these facts they would have proved enough to sustain their case on this point. They showed nothing upon the subject. It is not a case of condonation.*"

*Nor. Pac. Railroad v. Lewis, supra.*

In other words, the Supreme Court of the United States has considered that the Act in its present form condones past offenses.

## IV.

THE JURY ERRONEOUSLY ALLOWED INTEREST—  
SYLLABUS OF THE ARGUMENT.

The Court instructed the jury to allow interest. This was error, because:

1. No interest was allowable by the law of Montana at the time of the conversion.

2. No interest was allowable by the common law as matter of right.

3. No interest was allowable by the rule laid down by the Federal courts in cases of trespass upon Government timber lands.

4. The trial court refused to correct the error as to interest, not because the Government was entitled to any interest as matter of law or justice, but because counsel for appellant said, "I except to your Honor's instructions with regard to interest," instead of saying—"I except to the portion of your Honor's instruction with regard to interest, and also to the portion of it which fixes the rate at 7%." The omission of a mere verbal formula was thus punished by a fine of nearly twenty thousand dollars. In so ruling, the trial court was obviously in error.

5. The rule regarding exceptions is intended to further justice—not to entrap litigants into unconscionable forfeitures. In another District in a Government timber trespass case, the Court remitted the interest even though no assignment of error whatever was made regarding interest either in the trial court or on appeal. This was the correct view, and means that here the trial court erred in not requiring that the interest be remitted.

There are other questions: Upon the question of interest—no interest was claimed in the complaint as

it was originally filed. The complaint was amended in open court just before the case went to argument. It was amended over the objection of Mr. Hammond and his counsel (Tr., 746). The objection and exception appear in the record. The objection was overruled and the prayer was amended so as to include a prayer for interest. The Court charged the jury that if they found a verdict for the plaintiff, they should allow interest (Tr., 770), and his Honor told the jury after reading his instructions that the rate of interest was 7% (Tr., 776). These instructions were objected and excepted to.

Now, the allowance of interest depends sometimes upon local statutes, and sometimes upon the common law. If this question is to be determined by the *lex loci*—if this suit had been tried in Montana, where the suit might have been brought—no interest could have been allowed; for the law established by a decision of the Supreme Court of Montana is that interest in cases of conversion was not allowable when the alleged torts were committed. Your Honors may take that as the established law of Montana.

*Randall v. Greenhood*, 3 Mont., 506, 512;

*Palmer v. Murray*, 8 Mont., 174, 19 Pac., 553.

If on the other hand, the question is to be resolved by rules peculiar to the United States courts, then those rules are readily arrived at. It is quite conceivable that your Honors are free to hold that in the matter of



interest where the United States is a party, the United States courts are not bound by State laws, or State decisions, even in Districts where the trespass complained of actually occurred. It is the established law in timber trespass cases where the United States is a party, that the measure of damages for innocent trespass is the value of the stumpage in the tree without interest. You have passed upon timber trespass cases very often, and have laid down the rule for damages, and you have said nothing about interest. There has been some doubt in the Land Office as to whether or not that rule means that the value of the stumpage in the tree while standing is to be taken, or whether you figure the value of the stumpage after the labor necessary to sever the log from the stump has been added to the log. In either event, the place of conversion is at the stump, and the rule seems to be that it is the value of stumpage while the tree is standing. No interest is suggested or allowed in these decisions of the United States courts:

*U. S. v. St. Anthony R. R. Co.*, 192 U. S., 524;

*U. S. v. N. P. R. R.*, 67 Fed., 890;

*Gentry v. U. S.*, 101 Fed., 51;

*U. S. v. Teller*, 106 Fed., 451;

*U. S. v. Van Winkle*, 113 Fed., 903;

*U. S. v. Homestake Mining Co.*, 117 U. S.,  
482;

*Powers v. U. S.*, 119 Fed., 567;

*Lynch v. U. S.*, 138 Fed., 535;

*H. S. Williams Co. v. U. S.*, 221 Fed., 234.

I understand it also to be the rule of the common law, in all cases of unliquidated damages—whether they spring from contract or tort—that interest is not allowed as matter of right. Whenever allowed it is in the sound discretion of court or jury.

*Halsbury's Laws of England*, Vol. 10, pages 344-345.

I respectfully submit, therefore, that it is the law of Montana, where the trespass occurred, and the law also which the United States courts adopt for themselves in Government timber trespass cases and that it is also the rule of the common law, that no interest from the date of the conversion will be allowed as matter of right.

I insist that it is the true view that interest is not allowed by the United States courts at all in cases of timber conversion where the United States is the plaintiff. But at least it must be admitted that interest is never allowed in the United States courts as a matter of right in cases of conversion, but only as a matter of discretion. This was so held in

*White v. United States*, 202 Fed., 501.

In the case at bar the court gave an instruction which allowed interest as a matter of right—not as a matter of discretion. It was an instruction which cannot stand the test at all according to the law of Montana, if that is to be our guide. It was wrong,

also according to the law as declared by the United States courts in very numerous timber cases in which the United States is a party, if that is to be our guide. Mr. Hammond is therefore erroneously charged with interest, whether we measure the instruction by the Montana rule, or by the rule of the United States courts.

While the verdict in the case at bar is for a single amount—\$51,040—an analysis of it will show you this: The Government reduced its claim to 16,000,000 feet of lumber. One dollar per thousand feet was shown to be the stumpage value. The jury accordingly allowed \$16,000.00 for the stumpage value, and it allowed on this stumpage value, interest at 7% for 17 years, amounting to \$19,040.00; and it allowed another one dollar per thousand feet for profit which it assumed the lumber yielded. The verdict therefore takes from Mr. Hammond \$51,040.00 in all, which includes \$16,000 for stumpage, \$16,000 for the assumed profit, and \$19,040 for interest.

**TRIAL COURT RULING PERMITS THE GOVERNMENT TO  
UNJUSTLY RETAIN NEARLY \$20,000 ON A HIGHLY  
TECHNICAL VIEW OF A LONG ESTABLISHED RULE  
OF PRACTICE DESIGNED TO FURTHER JUSTICE.**

I believe that on his motion for a new trial appellant made an unanswerable showing on this matter of interest in the trial court. That court, however, found as a reason for adhering to the verdict allowing interest that the objection to the instruction regarding

interest (which chances to have been taken by me) was not sufficiently specific. In that I think that the lower court was clearly in error. I had supposed for some years that I comprehended the rule of practice in the Federal courts which requires that in taking exception to the charge, counsel must not do so in a general way, but must lay his finger upon each separate legal proposition which he finds objectionable. The purpose of the rule is to direct the attention of the Court to the precise matter objected to. It is a rule intended to further justice—not to trap litigants into unconscionable losses. I said to the trial court that I excepted to his Honor's instructions "with regard to interest." When the instructions were read by the Court, there was an instruction which told the jury that if they found for plaintiff, they should bring in a verdict for interest also. It did not say that the rate should be the legal rate of 7% per annum (Tr., p. 770). Six printed pages further on in the record, your Honors will find (p. 776) that after the instruction as to interest had been given, the Court at the close of the reading of all of the instructions, had its attention called by counsel for the Government to the fact that the Court had not specified the rate of interest in the following words: "I have no exceptions. "I merely suggest at this time that the rate of interest "should be stated to the jury by the Court."



His Honor then said:

"The rate of interest is the legal rate of seven per cent." (Tr., p. 776). After that, I stated my exception to his Honor's instructions on the subject of interest in these words:

"I also except to your Honor's instructions with regard to interest" (Tr., p. 780).

It seems to me that that exception pointed out to his Honor what was objected to with all of the clarity that reason can demand. In behalf of my client, I objected to the allowance of any interest at all. This objection covered the allowance of interest at any and every conceivable rate per cent. But I am told now that because I omitted to say: "I except to the portion of the instruction which allows interest and also to the portion thereof that fixes the rate at 7%"—that because I did not use that formula, my client must pay to the Government of the United States—for that bald, technical and hairsplitting reason—the sum of nearly \$20,000, although the Government has no legal or moral right to one penny of the sum. It may be that the interests and dignity of the Government of the United States demand that there shall be such a wrong. I cannot be convinced that it is so. I have no further defense to make of my personal part in the matter.

NOTE ON THE LAW RELATING TO THE FOREGOING  
PROPOSITION.

The following reference to the authorities will, we think, demonstrate how completely the trial court misconceived the rule in question.

In justification of its refusal to grant appellant a new trial because of the erroneous instruction regarding interest, the trial court relied upon *Mobile, etc., R. R. Co. v. Jurey*, 111 U. S., 584, 594.

We, on the contrary, regard that case as clear authority for our own position. There the court instructed the jury as follows:

“ . . . the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at eight per cent. per annum from the time when the cotton ought to have been delivered.”

*Mobile, etc., R. R. Co. v. Jurey, supra.*

*The exception under discussion in that case was merely a general exception to the whole charge, while the real objection was only to the rate per cent.*

There it was sought, under that general exception—which laid its finger on no single one of the two or more distinct propositions in the foregoing charge—to claim for the first time, after the verdict was rendered, that the rate of interest should have been 5%—the Louisiana rate,—instead of 8%—the Alabama rate.

In view of the nature of the objection so urged, the Court very properly said:

"The charge contained at least two propositions, first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. *It is not disputed that the first proposition was correct.* But the exception to the charge was general. It was, therefore, ineffectual. *It should have pointed out to the court the precise part of the charge that was objected to.*"

*Mobile, etc., R. R. Co. v. Jurey, supra.*

And as if to make it perfectly clear that an exception such as counsel for Appellant Hammond took in the case at bar is all sufficient, the United States Supreme Court in that case proceeded to say:

"So in *Lincoln v. Claflin*, 7 Wall., 132, this court said: 'It is possible the court erred in its charge upon the subject of damages in directing the jury *to add interest to the value of the goods.* . . . But the error, if it be one, cannot be taken advantage of by the defendants, *for they took no exception to the charge on that ground.* The charge is inserted at length in the bill. . . . It embraces several distinct propositions, and a general exception cannot avail the party *if any one of them is correct.*' On these authorities we are of opinion that the ground of error under consideration was not well saved by the bill of exceptions."

If by the rule declared in both of the foregoing quotations we measure the facts in the case at bar, we find this:

There it was admittedly proper to allow interest, but the rate of interest was a debatable proposition, and it was sought to object to the rate of interest and hence

two distinct propositions were involved in the instruction. *Here it has never been doubted that the rate of interest designated by the Court was proper if interest was to be allowed at all: the question of the allowance of interest at the legal rate is here a single indivisible proposition.*

There the instructions complained of, while jumbled into a single sentence, contained at least two distinct propositions of law—one admittedly proper, and one which did not question the right to include interest, but merely concerned the rate. Nevertheless, the exception taken was to the whole instruction.

*In the case at bar, on the other hand, the instruction regarding interest was given as a separate instruction. It stands alone. It is wholly bad, and was excepted to specifically.*

What the Court said regarding the rate of interest in the case at bar happened in this way: After the Court had finished reading its instructions, and several minutes after the instruction as to interest had been given, counsel for the Government said: "I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court."

"THE COURT—The rate of interest is the legal rate of seven per cent." (Tr., p. 776).

What was thus said was in law already embodied in the instruction which the Court had given. The jury had been told to allow interest and this meant at



the legal rate. The remark of the Court about the rate was hardly an instruction; it was rather an explanation of a previous instruction. It was obviously dependent wholly upon the prior instruction. Strike down the prior instruction, and the remark of the Court concerning the rate, even if treated as an instruction, is left hanging in the air and meaningless. It could not exist apart from the prior instruction and would necessarily fall with it. Any exception which reached the prior instruction would necessarily destroy the addendum. If hairsplitting nicety is to be the guide, it may be truly said that the instruction of the Court was an instruction regarding *interest*, while the final remark of the Court was at most an instruction regarding the *rate* of interest. Our exception (Tr., p. 780) was to the instruction "regarding *interest*"—not the *rate*—and hence strikes properly at the vital thing.

A general exception is proper whenever an instruction is wholly bad. Thus the Supreme Court was careful to say in the opinion from which we have quoted, *supra*:

"It (the instruction) embraces several distinct propositions and a general exception cannot avail the party *if any one of them is correct*."

*Montgomery, etc., R. R. Co. v. Jurey, supra*,  
(quoting from *Lincoln v. Claflin*, 7 Wall.,  
132).

And conversely, if any one instruction is incorrect *in toto*, a general exception to it will be sufficient.

(See discussion of the rule in *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed., 950, and the numerous cases there cited.)

In *Pritchard v. Sullivan*, 182 Fed., 480, the charge was a long one. The exception taken was in the following form:

"Defendants except to all that part of the instruction concerning the right of police officers to arrest without a warrant."

The Court said:

"We think the exception sufficient. . . . The exception was directed to that particular part of the charge and it was as definite and precise as if counsel had excerpted the exact language of the court and appended an exception to it."

The following statement of the rule is, we submit, consistent with common sense, with reason, and with justice:

"One of the important purposes of exceptions to a charge is to call a trial judge's attention to specific phases, claimed to be erroneous, so that he may reconsider and correct them if he desires to do so before the jury retires. This general rule must, however, be applied practically with a view of facilitating rather than impeding review. Accordingly, if in an attempt to take an exception a general reference to a topic discussed in a charge is made, and if that topic constitutes a succinct and definite portion of the charge clearly distinguishable from and not involved in other portions, it would satisfy all rational requirements."

*Winfrey v. M., K. & T. Ry. Co.*, 194 Fed.,  
813.

The foregoing is also entirely in line with the rule as announced by this Court—Judge Morrow rendering the opinion, Judges Gilbert and Ross concurring:

“We think the general exception taken by counsel for the plaintiff to the charge of the court in this case cannot be considered if any part of the charge states the law correctly. *The exception should have pointed out to the court the precise part of the charge that was objected to.*”

*United States v. Rossi*, 133 Fed., 383.

Another illustrative case is *Southern Pacific Company v. Arnett*, 126 Fed. Rep., 75, 80-1, wherein it is said:

“The entire charge of the court concerning the measure of damages and the interest upon the damages to be allowed is contained in a single paragraph, and the only complaint of it before the jury retired was a general exception ‘as to the measure of damages.’ No exception was taken to the allowance of interest, nor was the attention of the court in any way called to the question of law relating to it. Counsel for the defendant by their silence waived any objection to the charge upon this ground, and the error in this respect is not here for our consideration.”

*Southern Pacific Co. v. Arnett, supra.*

When the foregoing language is compared with what was done by counsel in the case at bar, the error into which the trial court has fallen becomes further emphasized.

In the case at bar counsel pointed out to the Court that he excepted to the Court’s instructions “with regard to interest.” That was the precise part objected

to. If it is well taken, the "charge" regarding the rate of interest is of no importance. It necessarily falls. It is a mere incident.

We respectfully submit, therefore that the form of the exception was sufficient to "satisfy all rational requirements."

## V.

### THE INSTRUCTION AS TO THE MEASURE OF DAMAGES WAS ERRONEOUS—SYLLABUS OF THE ARGUMENT.

1. The true measure of damages in all Government timber trespass cases, where the taking was not wilful, is the value of the stumpage. The evidence here is absolutely convincing that no wilful trespass was committed by anybody.

2. The Court in its instructions added to the stumpage value the profit on the manufactured article. The exception taken pointed out that the stumpage value is the true measure and that the instructions as given "added another element." This was clearly sufficient as a specification of the matter excepted to.

3. But the trial court held on the motion for new trial that the exception was not sufficiently specific to comply with the rule of court—and the effect is that unless this court interferes, appellant must pay over another sixteen thousand dollars to which the Government is neither legally nor morally entitled.

But I have a defense to make in regard to another one of his Honor's instructions to the jury: The trial court told the jury, in substance, that if they found that the trespass was innocent, that then they should



bring in a verdict for the selling price of the lumber, less the cost of manufacture (Tr., p. 771). That cost of manufacture would include, first, the cost of severing the log from the tree, then the removal to the mill, and the manufacture of it into lumber. When you take out that cost, that leaves two elements; namely, the stumpage value in the tree and the profit; in other words, "the value of the lumber, less cost of manufacture" would leave the stumpage value and the profit. The result was that the instruction told the jury to do what obviously it did do; namely, to bring in a verdict which would give to the Government, first, the stumpage value, and to add to this the profit, notwithstanding the fact that the trespass was an innocent one.

The exception to this instruction was taken by appellant's counsel after the reading by the Court of many pages of instructions, heard by counsel for the first time when read by the Court. Counsel was called upon to carry these instructions in his head and to state immediately and in detail in the presence of the jury the objections to these voluminous instructions—among them the instruction in regard to the measure of damages. Mr. Hammond's counsel in taking his exception said: "We insist that under the circumstances of this case the measure of damages is the value of the stumpage in the tree, and I think your Honor had added another element" (Tr.,     ). His Honor had in fact added the element of profit. His

Honor asked counsel for no further explanation of his reasons. I believed then, and I believe now, that I fully conformed to any reasonable interpretation of the rule which requires counsel to lay his finger upon each separate proposition which he objects to. I am now told that although it may be the law that the stumpage value is the true measure of damages, nevertheless, the Government of the United States is to take an additional \$16,000 from my client, because, forsooth, it is now said that I failed to make my exception sufficiently specific! I acted in accordance with what I understood to be the rule of court procedure applicable in these matters. I then believed my exception to be sufficiently specific and definite. I believe it so now. If my client shall be charged nearly \$32,000.00 in interest and in profit, which the Government is not legally or morally entitled to, merely because I failed to say, "McCarthy, come into my house," when I should have said, "Come into my house, McCarthy"—I resent it. And yet I recognize and give all respect to the rule itself. I appreciate its importance. Of course, counsel cannot be permitted to make a drag-net objection to instructions; but when the finger is laid upon the matter objected to as specifically as here appears—all has been done that a trial court may properly require. When this Court considers that such exception must be taken on the spur of the moment, and in the presence of the jury, with the attendant embarrassment—a not unreasonable

fear that the jury will get the impression that the Court itself thinks one's client liable—I submit that it should not require more of counsel than was done by counsel in this case. In both its letter and spirit there has been a fair compliance with the rule.

[See the law on this question, pp. 51-57, *supra*.]

APPELLANT COMPELLED TO DISCLOSE HIS WEALTH—  
AN OBVIOUS ERROR.

A. B. Hammond was compelled, first of all, to tell the jury how much he received for his stock in the Big Blackfoot Milling Company. His brother Henry had testified that for his interest he (Henry Hammond) had received \$250,000.00 (Tr. p. 434). This defendant was then compelled over objections to make the statement that he had received as much as his brother Henry (Tr., p. 708). That was one item of \$250,000 in the fortune of Mr. A. B. Hammond. But the inquisition did not stop there: Appellant was compelled to say that the present value of his holdings in the Missoula Mercantile Company—now twenty, thirty years after the commission of the alleged trespasses, was from two hundred and fifty to three hundred thousand dollars. I protested as best I could that it was not cross-examination; that it was immaterial; that it was irrelevant; that it was incompetent, that it was an improper inquiry into the private affairs of the witness, but without avail (Tr., pp. 708-710) and before that jury there went in the evidence

that my client was worth at least \$500,000 to \$550,000. Is not that obviously an error? Your Honors know in what a very few instances—in what a very limited class of cases, the wealth of the defendant can be inquired into. In some few cases where strictly punitive damages are permitted—as in cases of seduction—it is proper to inquire into the defendant's financial standing.

But the poor man and the rich man are measured by the same standard when they trespass upon the timber lands of the Government. The poor man who converts timber upon the Government land illegally must have judgment entered against him for the identical sum that it would be if he were worth millions. Who, in any case of conversion, has ever before heard of entering upon an inquiry as to the riches or private fortune of an individual? Courts have often held such inquiries to be totally irrelevant and always fatally prejudicial.

“But a new trial must be granted in this case for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict; nor is it important to enquire, as this is a bill of exceptions. The plaintiff was entitled to the damages he had sustained, and nothing more, without regard to the ability or poverty of the defendant. The admission of the evidence implied at least that the jury might graduate their verdict, in some measure, by the means possessed by the defendant to satisfy it.”

*Myers v. Malcolm*, 41 Am. Dec. (6 Hill, 292),

746;

*Hutchins v. Hutchins*, 98 N. Y., 57, at p. 64.



"But there was another item of evidence which was excepted to, and which we think was improperly admitted. The defendant was allowed to prove, under objection, that Hutchins was supposed to be worth \$15,000, while he testified that he himself was not a man of property. The evidence as to the wealth of P. Hutchins was clearly irrelevant and improper, and cannot be said to have been harmless. 'Illegal evidence that would have a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of the jurors in any degree, cannot be considered harmless. *Anderson v. The Railroad Co.*, 54 N. Y., 334.'"

*Peck v. Cooper*, 112 Ills., 192.

The tendency of such evidence is to give to the jury the idea that they should decide any doubtful question against the defendant; and merely because he has money—not because he is guilty—he is called upon to pay it.

If the time shall come when in these United States the rights of property are to be cast to the four winds and are no longer to be treated with respect—when a rich man's money will be taken from him in the courts merely because he is rich—it will mean that our constitutional guarantees have broken down, and that our Government as planned by our ancestors has come to an end. And if that time is ever to come, may I be permitted here to express the hope that the precedent is not to be laid for it by the United States courts in a suit wherein the Government of the United States is itself a party plaintiff!

## CLOSING ARGUMENT OF CHARLES S. WHEELER.

MR. WHEELER—If your Honors please: it seems to me that I could ask for no stronger corroboration of my contentions that there is no evidence to sustain this verdict than is found in the analysis of the facts which my learned friend has given you. It seems to me in all fairness that what he has said, completely bears out the assertion that I made in my opening argument that there is not one atom of evidence to connect the appellant with a single act of conversion.

Counsel has mentioned three or four matters upon which he bases his conclusion that Mr. Hammond was a party to the trespasses. One of these relates to the Bonita Mill on the Hell Gate. It appears that in 1885, while the Montana Improvement Company was setting up that mill for Fred Hammond, A. B. Hammond made one of his very few trips over to the mill site. There he saw a fifteen-year-old boy,—now a man 45 years of age—which emphasizes the length of time which has elapsed since these alleged trespasses were committed. The boy was driving a team for the Montana Improvement Company. He said to the boy: “where is your father?”—he had known the boy’s father before that—and the boy said, “he is over home.” And then this witness testifies that Mr. Hammond said, “you better go back and tell him to drive his own team; you are too small.” And now, try as you may, it is utterly impossible to connect that

trifling circumstance with anything involved in this case. That act occurred even before Fred Hammond had operated the property at all. And of what significance was it anyhow?

Next as to the evidence that defendant participated in sending men out from the East for the lumber camps: It appears from the evidence that Mr. Hammond and others there needed men on their various works. Mr. Hammond needed men on the railroad he was building up in the Bitter Root Valley. Other people needed men. They combined—all of these people—and sent one Hathaway East to get men, and the men were brought out. There is no evidence that Mr. Hammond himself ever got any men out for either Fenwick's or the Blackfoot mill. But if he had, of what significance would it have been? It is not contended that he or anybody else ever told them to take the timber involved in this action.

Then again, there was no postoffice at these various places where men were wanted, and consequently the store at Missoula became a sort of a labor clearing-house for all the manufacturing and farming concerns up there. The evidence is that if a farmer wanted a man to milk his cows he would send to the Missoula store for him. If Mr. Fenwick needed men for his mill on the Hell Gate, he would explain his wants to the Missoula store, and so it was with other millmen, contractors and manufacturers. And thus it was that laboring men who were around in the lumber country

came there to look for jobs and were sent around in different directions from the Missoula store. There is nothing sinister in a thing of that kind—nothing from which any inference can be drawn that this appellant was a party to any trespasses, conversion or other torts that may have been committed, either by the farmers or the mill owners or any of the other employers of labor.

And as to the suggestion that A. B. Hammond sent these laborers about as a part of a plan to steal Government timber and while he exercised a dominant control over these corporations: Such a contention is so utterly unjustifiable that it is an absurdity. Mr. Hammond had a large voice in the management of the Missoula Mercantile Company. He also gave his attention to the gigantic undertakings with which he was concerned in other directions. But the management of this Blackfoot mill was never undertaken by A. B. Hammond. He had nothing whatever to do with its actual operations in the woods, as I pointed out in the opening argument. So also as to the mill at Bonita, the evidence, as we have seen, is complete that George W. Fenwick owned that mill and managed it on and for his own account.



## REPLY AS TO THE MEASURE OF DAMAGES.

Now, as to the measure of damages: Why should this Court depart from the rule laid down in *U. S. v. St. Anthony R. R. Co.*, 192 U. S., 524? That rule is that if the trespass is innocent the measure of damage is the value of the stumpage at the tree. That measure is laid down by the United States Supreme Court. It does not include profit. It does not include interest. The Government now asks your Honors to enter into a new field and to add something else to the stumpage value.

Let us consider the question on principle for a moment. This case is not against the party who actually made the profit. For example, suppose that Fenwick himself made money on selling this lumber: concede that he ought not in justice to be allowed to keep that profit. He would suffer no loss of capital if he were deprived of the profit. It would not operate as a punishment, let us say, if this profit is taken from Fenwick. But how about the case of an agent of Fenwick's? Suppose that his foreman in the woods who actively participated in the cutting and handling of the logs and who, therefore, in law, is guilty of conversion—suppose that he, the man who actually sawed this timber down—suppose that he is the man sued? He is absolutely innocent of any intentional wrongdoing. Are you going to hold him under counsel's new rule, and say that he is liable not only for the stumpage, but also for the profit which his employer made?

Take a step further: A. B. Hammond was merely an agent for the corporation. The theory is that that corporation is somehow responsible for Fenwick's trespass. A. B. Hammond himself owned one-quarter of the stock in it. Concede that some one made a profit on the lumber. Who made it? That corporation did not get it (Tr., p. 557). Fenwick, as we have seen, turned over his lumber to Marcus Daly. Daly paid Fenwick, and Fenwick got the profit. If upon any conceivable theory the Missoula Mercantile Company could be liable if it were sued here with A. B. Hammond, is it not absurd to say that its liability would include the profit that Fenwick made—none of which came to it? But appellant Hammond is even further removed. He merely held one-quarter of all of the stock in the Missoula Mercantile Company. Shall he be punished by having an amount equivalent to Fenwick's whole profit charged against him and given over to the Government? Manifestly such a rule as counsel contend for would not—at least as against anyone save the man who made the profit—be either just or founded in sound reason.

A PRECEDENT FOR DISALLOWING INTEREST—EVEN IN THE ABSENCE OF A PROPER OR ANY OBJECTION—IF IT WAS UNJUSTLY AWARDED IN FAVOR OF THE GOVERNMENT.

With reference to the technical objections raised by the trial court on its own motion to the sufficiency of the exceptions to the instruction as to interest: I hope that your Honors will carefully consider the case in 202 Federal Reporter already referred to by me (*White v. United States*, 202 Fed., 501). There it appears that there had been no instructions at all upon the subject of interest in the court below. The Government had obtained a judgment which included interest. There had been no assignment of error whatever in the court below. There was in the assignments of error taken on the writ of error no assignment whatever upon the point of interest. And yet the United States Circuit Court of Appeals for the Fifth Circuit—which occupies the same high position that your Honors occupy—anxious to do exact justice, said that the error was so palpable that the Court would correct it, even in the absence of any exception or assignment of error whatever.

The Court there said that the allowance of interest in the United States courts is not a matter of right, but rests in the discretion of the jury. And the Court said that after a lapse of 13 years the ~~probability was that the~~ jury <sup>56</sup> would not have allowed any interest, because of the long and unexplained delay on the part of the Government in bringing the action, and that Court,—desirous of deal-

ing out exact and proper justice between the United States and its citizens—granted a new trial unless within a given time the Government should throw off that item of thirteen years' interest. That, I submit, is the correct view for the Federal courts of justice to take wherever the error is palpable and results in gross injustice. If that is so, what should the Court do in the case at bar, where counsel protested in the court below the best he knew how against the allowance of interest, and assignments of error were duly made both there and here?

If I correctly interpret that decision in *White v. United States*, *supra*, it means that the dignity, the integrity and the honor of the Government of the United States are sufficiently high to preclude it from taking advantage of hairsplitting technicalities in order to take money out of the pockets of its citizens—money to which it—a sovereign government—has no legal and no moral right.

We have to-day filed Vol. I of our brief. We have put into that a very careful review of all of the facts. We know that your Honors will find the statement fair. Vol. II of the brief will be filed in due course. It will deal with the law of the case. My argument before you to-day will be printed, and elaborated, with your Honors' permission, by reference to certain authorities. I may also refer to some facts in answer to my learned opponent.



I appreciate very much your Honors' courtesy in permitting me to go beyond the usual time in argument to-day.

Respectfully submitted  
Charles S. Wheeler

No. 2503

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

A. B. HAMMOND,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

BRIEF OF AMICI CURIAE,  
Filed by Leave of the Court.

E. S. PILLSBURY,

OSCAR SUTRO,

*Amici Curiae.*

**Filed**

MAY 4 - 1916

Filed this.....day of May, 1916.

**F. D. Monckton,**  
Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



No. 2503

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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A. B. HAMMOND,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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## BRIEF OF AMICI CURIAE,

Filed by Leave of the Court.

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In the brief for the plaintiff in error there is some discussion on the rule of damages. The point to which we respectfully call the court's attention relates more particularly to whether stumpage value or severed value is the true measure of damages in the case of innocent trespass.

We submit that the value of timber in the tree or of mineral *in situ* is the true measure of damages in case of wrongful taking by one acting in good faith.

Counsel for the plaintiff in error, at page 178 of their brief, refer to a decision of the Land Department of the United States under date of April 1, 1912, fixing the measure of damages, in cases of *bona fide* trespassers,



at the value of the timber "after the same has been severed from the soil, instead of the stumpage or standing value of the timber". *This decision has since been overruled* by the Land Office in the case of *John W. Henderson*, 43 L. D. 106, in an opinion written February 16, 1914, and which announces a rule more favorable to the plaintiff in error. A copy of the latter opinion, which reviews many of the authorities, is annexed as an "Appendix" hereto.

In the opinion last referred to the Land Department, as will be noted, reached the conclusion that the better rule, supported both by principle and precedent, is that the stumpage value only should be allowed. The law aims, in cases of innocent trespass, at compensation to the injured owner and no more. The value in place gives the owner compensation; the severed value would give him more than compensation.

The rule adopted by the Department of the Interior in the case of *John W. Henderson* on February 16, 1914, received still further consideration in an opinion written by the Honorable Clay Tallman, Commissioner of the General Land Office, 44 L. D. 112, which we quote in its entirety:

"The Department of Justice and the Solicitor of the Treasury have, however, adopted the severed value rule and maintained the attitude that an offer of settlement for less than the severed value does not represent the full measure of damages in an innocent timber trespass case. The Department of the Interior, *while it adheres in principle to the correctness of the rule as laid down in its decision of February 16, 1914, supra*, believes that in deference of the views of the other Executive Depart-

ments of the Government dealing with the same subject matter, this office should demand the severed value in innocent timber trespass cases until the question can be finally and authoritatively adjudicated by the courts."

With reference to the case of *United States v. St. Anthony Railroad Company*, which is discussed at some length by counsel for the plaintiff in error, it is pointed out in the decision in the *Henderson* case, 43 L. D. 106, as in the brief of plaintiff in error, that the court in the *St. Anthony* case allowed only the stumpage value. Judge Lowell, in *Trustees of Dartmouth College v. International Paper Company*, 132 Fed. 89, called attention to the same circumstance. In the last named case, which is cited by the defendant in error at page 57 of the brief for the United States, Judge Lowell reached the conclusion after an elaborate consideration of the subject, that the measure of recovery in the case of innocent trespass is the stumpage value of the trees, i. e., the value of the timber in the tree. In the following decisions, in cases of innocent trespass, the damages allowed for timber cut or mineral removed were for stumpage, or value in place. The reasoning in practically all of the opinions proceeds on the principle, to which we have referred, that compensation should be the limit of recovery by one whose property has been the subject of an unintentional trespass.

*United States v. Coughanour*, 133 Fed. 224,  
C. C. A., 9th Circuit;

*United States v. McKee*, 128 Fed. 1002, 9th  
Circuit;

*United States v. Teller*, 106 Fed. 447, 8th Circuit;  
*United States v. Eccles*, 111 Fed. 491, 8th  
 Circuit;

*United States v. Northern Pacific R. R. Co.*,  
 67 Fed. 890, 9th Circuit;

*United States v. Van Winkle*, 113 Fed. 903,  
 C. C. A., 9th Circuit;

*Stockbridge Iron Co. v. Cone Iron Co.*, 102  
 Mass. 86;

*Powers v. United States*, 119 Fed. 562, C. C. A.  
 6th Circuit;

*Gentry v. United States*, 101 Fed. 51;

*United States v. Ute Coal & Coke Co.*, 158  
 Fed. 20;

*Durant Mining Company v. Percy Consolidated  
 Mining Company*, 93 Fed. 166;

*Turner v. Seep*, 167 Fed. 646;

*Lyons v. Central Coal & Coke Company*, 144  
 S. W. 503;

*Coal Creek Mining & Manufacturing Company v.  
 Moses*, 83 Tenn. 300;

*Ross v. Scott*, 83 Tenn. 479;

*Warrior Coal & Coke Company v. Mabel Mining  
 Company*, 20 So. 918;

*Sandy River Cannel Coal Co. v. White House  
 Cannel Coal Co.*, 101 S. W. 319;

*Bennet Jellico Coal Company v. East Jellico Coal  
 Company*, 154 S. W. 922;

*Trustees of Proprietors of Kingston v. Lehigh  
 Valley Coal Co.*, 88 Atl. 763;

*Ib. v. Ib.*, 88 Atl. 768;

*Little v. Greek*, 82 Atl. 955;

*Oakridge Coal Co. v. Rogers*, 108 Pa. St. 147;

and *Waters v. Stevenson*, 13 Nev. 157, where the whole question is carefully analyzed and the authorities elaborately reviewed.

Dated, San Francisco,

May 1, 1916.

Respectfully submitted,

E. S. PILLSBURY,

OSCAR SUTRO,

*Amici Curiae.*

(APPENDIX FOLLOWS.)





# APPENDIX.

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JOHN W. HENDERSON.

(43 L. D. 106)

*Instructions February 16, 1914.*

## TIMBER TRESPASS—MEASURE OF DAMAGES.

In cases of innocent trespass, where timber is cut from lands of the United States, the stumpage value, and not the value after severance, is the proper measure of damages.

## CONTRARY INSTRUCTIONS RECALLED AND VACATED.

Instructions of April 1, 1912, in John W. Henderson, 40 L. D., 518, recalled and vacated.

JONES, *First Assistant Secretary:*

By decision of April 1, 1912, this Department, in the case of John W. Henderson (40 L. D., 518), laid down the following rule in cases of innocent timber trespass:

In all cases of innocent trespass, where timber has been cut from lands of the United States, whether the timber so cut has been converted by the trespasser or the innocent vendee of such trespasser, or whether it has been allowed to remain on the land where cut, the measure of damages should be the value of the timber after it has been severed from the soil and not its stumpage or standing value.

The above rule reversed the practice obtaining in this Department ever since the promulgation of the instructions of March 1, 1883 (1 L. D., 695), which provided:

Where the trespasser is an unintentional or mistaken one, or an innocent purchaser from such a trespasser, the value of the timber at the time when first taken by the trespasser, or if it has been converted into other material, its then value, less what the labor and expense of the trespasser and his vender have added to its value, is the proper rule of damages.

\* \* \* \* \*

In cases where settlement with an innocent purchaser of timber cut unintentionally through inadvertence or mistake is contemplated, you are instructed to report as nearly as

possible the damage to the government as measured by the value of the timber before cutting.

I have recently had occasion to consider the case of John W. Henderson, *supra*, in connection with certain proposed suits sought to be instituted.

The question presented is: What is the correct measure of damages to be recovered of an innocent trespasser upon the lands of the United States? In *Wooden-ware Co. v. United States* (106 U. S. 432), the second rule for the settlement of damages against a defendant in an action for timber cut and carried away from its lands is:

Where he (the defendant) is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value *at the time of conversion*, less the amount which he and his vendor have added to its value.

The doubt arises as to the exact period indicated by the phrase "time of conversion."

In *Pine River Logging Co. v. United States* (186 U. S. 279), the court states at page 293 that in *Wooden-ware Co. v. United States*, *supra*:

It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

In *United States v. St. Anthony R. R. Co.* (192 U. S. 524), after finding that the trespass was an innocent one, the court said at page 541:

The further question is as to the time when the value of the timber is to be ascertained.

The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was \$1.50 per thousand feet and the value upon delivery to the defendant was \$12.35 per thousand feet.

At page 542 the following rule is apparently laid down:

We think that then the measure of damages should be the value of the timber after it was cut at the place where it was cut.

It should be noted, however, that the judgment was "at the rate of \$1.50 per thousand feet," which, as appears in the report of the case below (114 Fed. Rep., 722), was the stumpage value.

The question of the correct measure of the damages in the case of an innocent trespasser was exhaustively considered by Judge Lowell (*Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. Rep., 92) who held that even in an action of trover the measure of recovery is the stumpage value of the trees at the time they were cut. After citing *Wooden-ware Co. v. United States*, *Pine River Logging Co. v. United States*, and *United States v. St. Anthony R. R. Co.*, he said at page 106:

While the language thus used by the Supreme Court, upon the whole, approves as measure of damages the value of the logs immediately after their separation from the freehold, it is plain that the difference between this value and stumpage has never been expressly considered by that court. On technical grounds it is possible to argue with some force that the plaintiff should be given the value immediately after severance, but the stumpage value better accords with the principles upon which the allowance for improvements is made. Neither measure is strictly accurate, as has been pointed out already, but, if the defendant is to be allowed for any improvements,



then to deprive him of the value of the improvement first in time and most necessary, viz, that arising from severance from the realty, is to make the technical difference between real property in the shape of a standing tree and personal property in the shape of a felled tree the cause of a great difference in substantial rights. The weight of authority outside the Supreme Court, on the whole, supports the allowance of stumpage only, and with some doubt I have decided to allow only that in this case.

The same measure was adopted in *United States v. Van Winkle* (113 Fed. Rep., 903) and *Gentry v. United States* (101 Fed. Rep., 51). In *United States v. Homestake Mining Co.* (117 Fed. Rep., 481), the Circuit Court of Appeals of the Eighth Circuit held that the limit of liability for damages of one who takes ore or timber from the land of another through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees. The same holding was made in *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.* (129 Fed. Rep., 668). It is thus apparent that in the Federal courts the great weight of authority is to the effect that the stumpage value, and not the value after severance, is the proper measure of damages in the case of an innocent trespasser. This is further strengthened by the observations of the Supreme Court in *Wooden-ware Co. v. United States*, at page 433, concerning English decisions in similar trespasses of coal. Justice Miller there said:

In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of

the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine—

and upon page 434 he quotes the following language of Lord Hatherley:

But “when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie*.”

Peacock et al. v. Feaster decided by the Supreme Court of Florida, January 30, 1906 (40 Southern Reporter, 74), is cited as authority for demanding the value of the timber after it has been felled. A reference to the report discloses that the decision, so far as the measure of damages is concerned, is based wholly upon an earlier decision of that court in Wright & Co. v. Skinner (34 Fla., 453). That was an action in *trover* and the court held that in such an action brought against an innocent trespasser the value of the property *at the time and place of its conversion* must govern; that when the property converted consisted of logs, the *conversion* did not become complete until they were actually removed from the owner's land and that an innocent trespasser was not entitled to any deduction for any additional value placed by him upon the property *anterior* to the time that the conversion became complete. To the same effect are Winchester v. Craig (33 Mich., 205); White v. Yawkey (108 Ala., 270); Ivy Coal and Coke Co. v. Alabama Coal and Coke Co. (135

Ala., 579); *Beede v. Lamprey* (64 N. H., 510); also *Franklin Coal Co. v. McMillan* (49 Md., 549), and *Blaen Avon Coal Co. v. McCulloch et al.* (59 Md., 403).

In all except the last two, the actions were the common law action of trover, which could be maintained only as to personal property. In other words, the argument is, that the timber does not become personal property until severed from the realty and that, therefore, the correct measure of damages is the value of the timber as personal property at the time of its conversion.

The Supreme Court of Pennsylvania, however, repudiated this doctrine even in a technical action of trover. *Forsyth v. Wells* (41 Pennsylvania State, 291). The nature of the action is sufficiently indicated by the syllabus:

1. Trover lies for coal mined upon, and carried away from another's land by mistake.
2. The measure of damages is the fair value of the coal in place, and such injury to the land as the mining may have caused.

The court said:

The plaintiff insists that, because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined, and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do,

and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it.

The American and English Encyclopedia of Law, 2nd Edition, Volume 28, page 724, so summarizes the varying rules:

Where, however, the defendant acted in good faith, the owner of the land has been allowed to recover only the value of the standing trees, or the stumpage value, or the value of the logs deducting the cost of felling the timber, thereby giving to him the benefit of his labor, or the value of the trees immediately after they had been severed from the land so as to become chattels and the subject of conversion.

As to the last proposition, it cites *White v. Yawkey*, *Wright v. Skinner*, and *Beede v. Lamprey*, *supra*.

From the above summary, it is apparent that the great weight of authority supports the rule of allowing but the stumpage value in the case of an innocent trespass. The cases allowing the additional value caused by the labor of the innocent trespasser in severing the timber from the soil are almost wholly actions which were the technical common law actions of trover which compel, in the view of those courts, a recovery of the value of the timber after it had become personal property and was converted to the defendant's use.

As in most of the states the distinction between the different forms of actions has been abolished and as the great weight of authority supports the prior uniform practice of the Department in demanding merely the *stumpage* value in the case of an innocent trespass, I am of the opinion that the stumpage value alone should be demanded in innocent trespasses.



The case of John W. Henderson (40 L. D., 518) is accordingly recalled and vacated and hereafter you will adjust cases of innocent trespass in accordance with the measure of damages herein adopted.

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

A. B. HAMMOND,  <i>Plaintiff in Error,</i>  vs.  UNITED STATES OF AMERICA,  <i>Defendant in Error.</i>
--

In Error to the District Court of the United States for the  
Southern Division of the Northern District of California.

**PETITION FOR REHEARING**

FRANK HALL,  
*Attorney for Petitioner.*

Filed this.....day of November, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

FILED

NOV 24 1917



# United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,

*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

## PETITION FOR REHEARING

Comes now the United States of America, defendant in error, and prays that a rehearing may be granted in said case and the decision and opinion of the Court recalled because of error believed to exist therein, upon the grounds and because of the errors hereinafter set forth.

### I.

The Court erred in holding that the exception interposed to the instructions of the trial court on the measure of damages was sufficiently specific to direct the attention of the Court to the errors complained of. In instructing the jury with respect to the amount of the verdict in the event it found the defendant was liable as a wilful trespasser, the Court said:



“If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.”

In instructing the jury on the measure of damages applicable in the event it was determined that the defendant was an innocent trespasser, the Court said:

“If you find that the defendant, or any of the said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.”

The objection interposed by counsel for the de-

feudant to the instructions given by the Court on the measure of damages is as follows:

“Mr. Wheeler. Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your Honor’s instructions add to it another element.”

It will thus be seen that the Court’s instructions on the measure of damages embraced at least two elements, and as counsel for the plaintiff in error would have the Court believe, three elements. The exception in no manner indicates which feature was objectionable to counsel. The language used merely indicates that counsel had some other and different views from those expressed by the Court. He indicated that he thought the only measure of damage that could exist under the circumstances was the value of the timber in the tree and that the instructions added another element thereto. It is clear indeed that the instructions of the Court did add another element thereto, and especially so if the jury found that the plaintiff in error was guilty of a wilful trespass, for the Court expressly instructed the jury in that event that it could return a verdict for the full manufactured value of the lumber. It cannot be said that counsel for the plaintiff in error was not advised of the claims being made by the Government, for the pleadings clearly and specifically set forth the value of the

timber in all its conditions from the time it was standing in the tree until it was manufactured and disposed of as alleged. Neither does the exception nor the record itself disclose any attempt on the part of counsel to correctly inform the Court of his views, nor even to ask the Court to give the instruction which this Court has said in its opinion was the proper one. The courts have repeatedly condemned such practice, and we now submit that the present interpretation placed upon the language used by counsel in this exception is not in accord with the decision of this and other courts. The thoroughly established rule as announced by the decisions is that if counsel desire any instruction given or wishes to oppose any instruction given by the Court, they must point out specifically wherein the Court has erred in the instruction already given or submit to the Court the proper instruction, but such was not done in this case. He did not give the trial court the benefit of his views and it was not advised of the fact that he claimed as error the giving of the instruction to which objection is now made.

In this Court counsel has strenuously insisted that the evidence failed to show that the plaintiff in error was liable as for a wilful trespass and the language used in this exception may at least equally well be construed to say that he was there attempting to object to the Court giving any instruction based upon the theory that the trespass was wilful.

It is respectfully submitted that the Court's in-

terpretation of the language used in the exception is not in accord with the opinion of the Supreme Court of the United States in the case of *United States vs. U. S. Fidelity & G. Co.*, 236 U. S. 512, where it was said:

“The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court.”

In the case of *McDermott vs. Severe*, 202 U. S. 598, 611, the court said:

“If the defendant wished the charge modified in this respect, he should have called the attention of the court directly to this feature.”

We earnestly insist that the language used by counsel in his exception to the instructions of the Court neither pointed out the precise matter which was objectionable, nor did it with that fairness which the courts demand indicate the correct instruction which the Court should have given.

In its opinion this Court has cited the case of *Sam Wick vs. United States*, 240 Fed. 60, 65. In this case the instruction excepted to in general lan-



guage contained but one element and did not, as in the case at bar, contain a number of different and distinct elements. We have no complaint to make against the Court's finding in the case last cited, that a general exception to an instruction containing one element will be sufficient, but we do say that in the present case the general exception made by counsel was not sufficient to advise the trial court of the alleged errors of which he now complains, and we submit that there was nothing in the language of this exception which afforded the Court an opportunity to correct or modify its instruction. In the case of *McDermott vs. Severe*, 202 U. S. 600, 610, the court said:

“A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous.  
\* \* \* It would be very unfair to the trial court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal.”

See also *Mobile, etc., vs. Jurey*, 111 U. S. 584, 596.

*Jacobs vs. Southern R. Co.*, 241 U. S. 229, 237.

*Illinois C. R. Co. vs. Skaggs*, 240 U. S. 66, 71-74.

And in the case of the *United States vs. U. S. Fidelity & G. Co., et al., supra*, the court said:

“An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court.”

As expressed in the exception in the instant case, counsel indicated to the Court that he thought the only instruction that should be given should limit the recovery to the value of the timber before severed. Such a measure of damages has not been upheld by the courts and is specifically repudiated in this Court's opinion in this case. If the present judgment of this Court is allowed to stand, it therefore follows that the Court has not only rewarded counsel for failure to fairly enlighten the trial court, but has rewarded him for attempting to induce the trial court to give an instruction which in the most favorable light would have been erroneous.

## II.

The Court erred in holding that the exception interposed to the instruction of the trial court on the question of interest was sufficiently specific to direct the attention of the Court to the error complained of. The Court instructed the jury as follows:

“In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time.”

At the close of the Court's instructions, the following colloquy between Court and counsel occurred:

“BY THE COURT: Have counsel any suggestions to make?

MR. HALL: I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court.

THE COURT: The rate of interest is the legal rate of 7%.”

In saving his exception to the Court’s instruction counsel said:

“I also except to your Honor’s instructions with regard to interest.”

As indicated by the trial judge in passing upon the motion for a new trial (*United States vs. Hammond*, 226 Fed. 849), the instruction on interest contained two elements: (1) the right to interest; (2) the rate of interest. And counsel did not indicate in his exception which portion of the instruction was objectionable. Here, again, we invite the Court’s attention to the cases already cited in this petition and in the brief heretofore filed, to the effect that the instruction complained of contained more than one element, and that where such is the case a general exception is not sufficient. Counsel for the plaintiff in error has contended in this court, and this court has held, that in cases of this sort the question of interest is discretionary with the jury, but he did not accord the trial court the opportunity to submit the question to the discretion of the jury, but remained silent, and now for the first

time in this Court says that the trial Court erred in not so doing.

For the reasons and upon the grounds above set forth, it is respectfully urged that a rehearing be granted in this cause; that the opinion heretofore filed be withdrawn; and that the judgment of the court below be affirmed.

FRANK HALL,  
*Attorney for Defendant in Error.*

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I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded and is not interposed for delay.

FRANK HALL,  
*Attorney for Defendant in Error.*













